

NORTH CAROLINA
COURT OF APPEALS
REPORTS

VOLUME 77

1 OCTOBER 1985

19 NOVEMBER 1985

RALEIGH
1987

CITE THIS VOLUME
77 N.C. App.

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

J. RUSSELL TERRY, PLAINTIFF APPELLANT v. BROTHERS INVESTMENT COMPANY, DEFENDANT APPELLEE AND THIRD PARTY PLAINTIFF APPELLANT v. JOHN BASS BROWN, MILDRED B. MONTGOMERY, SUTHERLAND M. BROWN, CARRIE M. GILCHRIST, DOLPH M. YOUNG, SADIE YOUNG HOLLAND, PETER M. B. YOUNG, AND WILLIAM P. YOUNG, THIRD PARTY DEFENDANT, APPELLEES

No. 8426SC1332

(Filed 1 October 1985)

1. Registration § 3— acceptance of conveyance subject to unrecorded claim—ratification

When a grantee accepts a conveyance of property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest. By accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity.

2. Registration § 3— trustee's deed—chain of title of subsequent purchaser

Where testatrix's will devised realty in trust to NCNB and an individual as trustees, provided that the income should be paid to the individual for life, gave the trustees the power to sell the realty, and provided that, upon the death of the individual trustee, the remaining property would vest in fee simple in the children of testatrix's brother and sister, a deed from NCNB as trustee conveying the remaining property to the children of testatrix's brother and sister as tenants in common after the individual trustee's death was a deed within the chain of title of the purchaser of the property from the tenants in common.

3. Registration § 3— purchaser bound by unrecorded lease

The purchaser of property was bound by a prior unrecorded lease, although the purchaser's deed did not mention the prior lease, where a deed in

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the purchaser's chain of title provided that the conveyed property "is subject to the rights of tenants in possession pursuant to the terms of a Lease between Carrie Marshall Gallaway and Brothers Investment Company dated March 21, 1963," since the reference to the lease in the prior deed was sufficient to meet the four requirements of *Hardy v. Fryer*, 194 N.C. 420, 139 S.E. 833 (1927). The requirement that the amount of the prior encumbrance be definitely stated was met even though the reference did not state that the lease term was more than three years where it could be determined from the stated date of the lease and the date of the deed that the lease was for a term in excess of three years.

4. Landlord and Tenant § 13.3; Tenants in Common § 5— renewal of lease—notice to two of eight co-tenants

Defendant lessee validly exercised its option to renew the lease by mailing notice to two of the eight co-tenant owners where defendant had been directed to send rental checks to the two co-tenants and had done so for a period of eight years, since under such circumstances it is presumed that the acts of the two co-tenants in accepting notice of renewal were done with the authority and for the benefit of all eight co-tenants.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 20 July 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 August 1985.

This civil action arose out of a dispute over certain property located in Mecklenburg County (the Property). The plaintiff, J. Russell Terry (Terry) filed this action against North Carolina National Bank (NCNB), Ashley Services, Inc. and Brothers Investment Company (Brothers) seeking a declaratory judgment that he holds title to the disputed property free and clear of Brothers' asserted leasehold interest. NCNB and Ashley Services, Inc. are sublessees of Brothers. All claims against these sublessees were subsequently discontinued. Brothers filed counterclaims seeking a declaratory judgment that Terry's title to the Property is subject to Brothers' leasehold interest in the Property. Brothers also joined as third-party defendants, John Bass Brown, Jr. *et al.* who were successors in interest to Brothers' lessors and had conveyed the Property to Terry. In its action against the third-party defendants, Brothers sought a declaratory judgment that the third-party defendants held the Property subject to Brothers' leasehold interest in the Property and that title conveyed by the third-party defendants to Terry was subject to Brothers' leasehold interest.

The essential facts are:

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On 21 March 1963 Brothers, as lessee, entered into a lease agreement (the "Gallaway Lease") with Carrie Marshall Gallaway, as lessor whereby Brothers leased the Property for twenty years with an option to renew for an additional thirty years. Brothers began paying rent in 1963. On 10 November 1969 Brothers by written instrument subleased a portion of the Property to NCNB for a 15 year term with an option to renew for an additional 20 years. NCNB constructed a branch bank on the leased property and has been in possession since 1970. Brothers continued to pay rent to Carrie Marshall Gallaway until her death on 8 November 1972. Under the terms of Carrie Marshall Gallaway's will (the "Gallaway will") the Property was devised in trust to North Carolina National Bank ("NCNB") and Gaston G. Gallaway, as trustees. After Carrie Marshall Gallaway's death, Brothers made all rental payments to NCNB and Gaston G. Gallaway.

The terms of the Gallaway will provided that the Property be held in trust until the death of Gaston G. Gallaway. At his death, the Gallaway will provided that the remaining property would vest in fee simple in the children of Nancy Brown Young and John Bass Brown sister and brother of Carrie Marshall Gallaway.

On 30 June 1974 when Gaston G. Gallaway died, the remaindermen under the Gallaway will were John Bass Brown, Jr., Mildred B. Montgomery, Sutherland M. Brown, Carrie M. Gilchrist, Dolph M. Young, Sadie Young Holland, Peter M. B. Young and William P. Young (referred to collectively as the "Gallaway heirs"). On 26 September 1974, NCNB, acting as executor and trustee under the Gallaway will, executed a deed conveying the Property to the Gallaway heirs as tenants in common (the "NCNB deed"). The NCNB deed was recorded on 30 September 1974. The NCNB deed provided that "[t]he above described parcel is subject to the rights of tenants in possession pursuant to the terms of a Lease between Carrie Marshall Gallaway and Brothers Investment Company dated March 21, 1963."

On 2 October 1974, NCNB by letter informed Brothers of the transfer of the Property to the Gallaway heirs and instructed Brothers to make rent payments to Mildred B. Montgomery and Dolph M. Young. From November 1974 through October 1982 Brothers made all rental payments as instructed in the NCNB let-

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ter. The Gallaway lease gave Brothers the right to renew the lease for an additional 30 years provided written notice of the exercise of the right to renew was given at least one year before the end of the lease term. On 23 June 1980 Brothers mailed written notices of its exercise of the right to renew to two of the Gallaway heirs, Mildred B. Montgomery and Dolph M. Young.

On 25 August 1980 Brothers subleased by written sublease agreement a portion of the Property to S. M. Horton Car Wash Equipment Company for a term of twenty years beginning 1 December 1980. Thereafter, Horton constructed a car wash facility on the leased premises and on 24 December 1980 assigned its right under the sublease agreement by written instrument to Ashley Services, Inc.

In May 1982, Dolph M. Young, one of the Gallaway heirs contacted the plaintiff Terry and offered to sell the Property for \$275,000.00 with attractive financing terms. Young explained to Terry that there was an unrecorded lease on the Property which was binding on the Gallaway heirs but would probably not be binding on Terry if he decided to buy the Property. Terry was furnished a copy of the Gallaway lease in June 1982. He also requested that his attorneys review the NCNB deed.

By deed dated 26 July 1982 and recorded 24 September 1982 the Gallaway heirs conveyed their interest in the Property to Terry by warranty deed which expressly provided that it was not intended that the Property be conveyed subject to any leases or the rights of any parties who may be in possession. The Gallaway heirs accepted a down payment of \$6,000.00 and a purchase money deed of trust in the principal amount of \$269,000.00. On 4 October 1982, Terry notified Brothers of his claim to the property and stated that he did not recognize the Gallaway lease or Brothers' claims of the right to possession.

On 5 October 1981 a memorandum of the NCNB sublease with Brothers was recorded. On 12 October 1982 the written assignment of the sublease between Horton Car Wash Equipment Company and Ashley Services, Inc. was recorded. Finally, on 9 November 1982 the original lease between Carrie Marshall Gallaway and Brothers was recorded.

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At the hearing on cross motions for summary judgment filed by Terry, Brothers and the Gallaway heirs (third-party defendants), the Honorable Frank W. Snapp, Jr. granted summary judgment in favor of Brothers and against Terry as to the binding effect of the lease upon Terry. He also granted summary judgment in favor of Terry and against Brothers with respect to Brothers' counterclaims, and granted summary judgment in favor of the Gallaway heirs and against Brothers, with respect to the issues raised in the third-party complaint.

From the entry of summary judgment against him and in favor of Brothers, Terry appeals. Brothers asserts protective assignments of error.

Kenneth W. Parsons for plaintiff-appellant.

Parker, Poe, Thompson, Bernstein, Gage and Preston by William E. Poe and Irvin W. Hankins, III for defendant-appellee and third-party plaintiff-appellant.

Murchison, Guthrie and Davis by Alton G. Murchison, III for third-party defendant-appellees.

EAGLES, Judge.

I

The first issue to be decided here is whether the plaintiff holds the Property subject to the Gallaway lease. We hold that he does.

The plaintiff contends that he holds the Property free and clear of the Gallaway lease because at the time he acquired the Property the lease had not been recorded as required by the Connor Act. G.S. 47-18. The portion of the Act on which plaintiff relies provides:

(a) No . . . (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies. . . .

The lease at the heart of this controversy was executed on 21 March 1963 with a lease term of 20 years plus a 30 year renewal

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option. It was not recorded until 9 November 1982. The Property was conveyed to the plaintiff on 26 July 1982 and the deed to plaintiff was recorded on 24 September 1982. Plaintiff properly insists that no notice however full and formal will supply the want of registration. *Collins v. Davis*, 132 N.C. 106, 43 S.E. 579 (1903). This principle of notice by recordation only is strictly adhered to by our courts, *State Trust Co. v. Braznell*, 227 N.C. 211, 41 S.E. 2d 744 (1947), and the Connor Act would, on its face, give the plaintiff the right to eject Brothers, its lessee, and the sublessees.

[1] However, when a grantee accepts a conveyance of property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest. By accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity. *State Trust Co. v. Braznell*, *supra*. This principle is not based on notice and does not operate as an "exception" to the pure-race theory of title in North Carolina. It derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. *Hardy v. Fryer*, 194 N.C. 420, 139 S.E. 833 (1927).

Our Supreme Court in *Hardy v. Fryer*, *supra*, specifically addressed the effect of a reference in a recorded instrument to a prior unrecorded encumbrance and under what circumstances it constitutes a valid, enforceable lien by the holder of the prior unrecorded encumbrance. The court listed four requirements or conditions that must be met before a reference to a prior unrecorded encumbrance will constitute a valid lien. They are:

1. The creditor holding the prior unregistered encumbrance must be named and identified with certainty.
2. The property must be conveyed "subject to" or in subordination to such prior encumbrance.
3. The amount of such prior encumbrance must be definitely stated.

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4. The reference to the prior unregistered encumbrance must amount to a ratification and adoption thereof.

Id. at 422, 139 S.E. at 834.

From the facts of this case two factual distinctions appear. First, the plaintiff's deed from the Gallaway heirs makes no mention of the prior unrecorded lease and contains none of the requirements as set out in *Hardy v. Fryer, supra*. Second, the unrecorded lease was not executed by plaintiff's grantors, the Gallaway heirs. The lease was executed by Carrie Marshall Gallaway, ancestor of the Gallaway heirs. However, we do not believe that these factual distinctions prevent the principles announced in *State Trust Co. v. Braznell, supra*, and *Hardy v. Fryer, supra*, from applying to this case.

Hardy v. Fryer, supra, involved a question of priority between two mortgages. A brief summary of the pertinent facts may prove helpful. In 1920 J. T. Harris sold certain property to the plaintiff, Hardy, and a deed was immediately recorded. At the time of sale, the plaintiff executed a mortgage to the defendant Farmville Building and Loan Association, but the mortgage was not recorded until three years later. The plaintiff also executed a mortgage in favor of Harris, the seller. This mortgage was recorded first. Harris then transferred the mortgage to Fountain Bank which in turn sold the notes to one Fryer. The deed from Harris to Hardy contained the following reference:

That the [property] is free and clear of all encumbrances except mortgage to the Farmville Building and Loan Association, which is hereby assumed by the party of the second part, which assumption is part of the purchase price hereof.

Hardy v. Fryer, at 421, 139 S.E. at 833.

Defendant Fountain Bank argued that it could not be bound by the reference in the deed because it was not a party to the deed and its mortgage contained no reference to the prior encumbrance. Our Supreme Court rejected this argument stating that since the reference occurred in a conveyance which was an essential part of defendant Fountain Bank's chain of title, the Bank was charged with full notice of the provisions contained in that deed. *Hardy v. Fryer, supra*. Accordingly, under North Carolina law, if there exists an expression of subordination to a prior unrecorded

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encumbrance in an instrument within a subsequent grantee's chain of title that is sufficient under the requirements of *Hardy v. Fryer, supra*, then the subsequent grantee, by accepting his deed, ratifies the unrecorded encumbrance and is estopped from asserting the invalidity of the encumbrance. *State Trust Co. v. Braznell, supra*.

Although *Hardy v. Fryer* involved a battle for priority between two mortgages and not a leasehold interest, we believe that the same principles should apply here. In order to decide if the lease, unrecorded at the time the property was transferred to the plaintiff, is valid and binding on the plaintiff under the rule of *Hardy v. Fryer*, we must answer two questions. Is the NCNB deed within the plaintiff's chain of title? If so, is the reference to the prior unrecorded lease contained in the NCNB deed sufficient under the *Hardy v. Fryer* four-part analysis to constitute a valid lien?

[2] We hold that the NCNB deed is within plaintiff's chain of title. By Item IX, the Gallaway will directed that the remainder of the real estate be placed in trust with NCNB and Gaston G. Gallaway named as trustees. Item IX(a) of the Gallaway will gave the trustees power to hold, manage, invest and re-invest the property. Item IX(b)(2) authorized the Trustees to sell the real property if a sale would be in the best interests of the estate. Item IX(c) provided that the trustees pay over to Gaston G. Gallaway the net income from the rest and residue of the real estate for his lifetime, and

upon his death, said trust, as to such *remaining* property, shall terminate and the title to said property shall thereupon vest in fee simple, share and share alike, in the children of my sister, Nancy Brown Young, and my brother, John Bass Brown, then living and the issue of such as may then be dead, per stirpes. [Emphasis added.]

Given this language and the trustees' power to sell, a deed from the trustee was necessary to ascertain, for title examination purposes, what property existed for distribution to the surviving Gallaway heirs and the identity of those surviving heirs.

At the death of Gaston Gallaway the trust terminated. At that time, it was the duty of the surviving trustee, NCNB, to dis-

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tribute the remaining property held in trust to those heirs entitled to take. *First Citizens Bank and Trust Co. v. Carr*, 279 N.C. 539, 184 S.E. 2d 268 (1971). See Bogert, *The Law of Trusts and Trustees* Section 1010 (rev. 2d ed. 1983). A careful and prudent title examiner having the knowledge that the Gallaway heirs took the Property either by the will of Carrie Marshall Gallaway or by deed would discover the NCNB deed to the Gallaway heirs executed 26 September 1974 and recorded 30 September 1974. An examination of the Gallaway will would reveal the creation of the trust and the grant of power to the trustees to sell the real property. This information would lead the careful and prudent title examiner to check all out conveyances of NCNB as trustee. The NCNB deed would be discovered. Further, even if the examiner began his search instead with the grantee index in the name of the Gallaway heirs, the discovery of the NCNB deed would be inevitable.

[3] Having determined that the NCNB deed is within plaintiff's chain of title, we must now decide whether the reference contained in the deed to the prior unrecorded lease satisfies the four-part analysis of *Hardy v. Fryer*, *supra*. We hold that the reference as set out in the NCNB deed sufficiently complies with the *Hardy v. Fryer* requirements. The pertinent language taken from the NCNB deed dated 26 September 1974 is as follows: "The above described parcel is subject to the rights of tenants in possession pursuant to the terms of a Lease between Carrie Marshall Gallaway and Brothers Investment Company dated March 21, 1963."

In oral argument plaintiff's counsel candidly conceded that requirements one, two and four were met by the above quoted reference. Plaintiff's counsel argued that the third requirement of *Hardy v. Fryer*—that the amount of the prior encumbrance must be definitely stated—was not satisfied by the above quoted reference. Here we are dealing with a lease and not a mortgage as was the case in *Hardy v. Fryer*, *supra*. Plaintiff contends that the omission in the reference that the lease term was for more than three years constitutes a failure to meet this third requirement. We are not persuaded. The date the lease was executed is stated—21 March 1963. The NCNB deed was executed on 26 September 1974. By simple mathematical calculation it can be easily determined that the lease was for a term in excess of three years. We

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do not find this omission fatal under the four-part analysis of *Hardy v. Fryer, supra*.

In summary, we find that the NCNB deed to the Gallaway heirs was within plaintiff's chain of title and that it sufficiently described the unrecorded lease as to bring it within the four part analysis of *Hardy v. Fryer*. Consequently, we hold that the plaintiff took the property subject to the unrecorded lease.

II

[4] The next issue is whether the record supports the trial court's determination that the defendant Brothers validly exercised its option to renew. We hold that it does.

The lease required that defendant Brothers give written notice of its intention to exercise the right to renew "not less than one (1) year prior to the end of the original term of [the] lease." The lease's original term would have expired 31 December 1982. Brothers exercised its right to renew the lease on 23 June 1980 by mailing written notices to Mildred Montgomery and Dolph M. Young. These were the only two of the eight co-tenants that Brothers had dealt with since the execution of the NCNB deed in 1974. Plaintiff does not dispute that the notices were timely, however, he contends that the lease renewal was ineffective because notices were not mailed to all eight co-tenants. Plaintiff offers no support for this contention.

North Carolina courts have recognized that the acts of one co-tenant with relation to the common property may be presumed to have been done with authority and for the benefit of all co-tenants if there are circumstances on which to base that presumption. *Hinson v. Shugart*, 224 N.C. 207, 29 S.E. 2d 694 (1944); see J. Webster, Real Estate Law in North Carolina Section 113 n. 41 (P. Hetrick rev. ed. 1981). In 1974, shortly after the NCNB deed to the Gallaway heirs, Brothers was notified by letter from NCNB that all future rental checks were to be sent to Mildred Montgomery in the amount of \$171.42 and to Dolph Young in the amount of \$228.58. For the next eight years—up until the time the written notices were mailed—all rental checks were sent as instructed to those two individuals. We find that based on these facts, there are sufficient circumstances on which to base the presumption that the acts of the two co-tenants in accepting notice of the

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renewal were done with the authority and for the benefit of all eight co-tenants.

The remaining issues and assignments of error deal with defendant Brothers' protective appeal. Since we affirm the trial court's entry of summary judgment in favor of defendant Brothers, we need not address those issues.

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. RICHARD LEWIS TREXLER

No. 8428SC1346

(Filed 1 October 1985)

Criminal Law § 106.4; Automobiles and Other Vehicles § 127.3— DWI—defendant's confession—insufficient evidence of corpus delicti

There was insufficient evidence to convict defendant of driving while impaired where a Mr. Hall, asleep in his home, heard a loud noise, saw a vehicle which had been wrecked on the highway in front of his home, and saw defendant in the area; defendant told a highway patrolman that he had been driving the automobile at the time of the accident; and defendant was under the influence of alcohol at that time in the opinion of the patrolman. Proof that there was an accident and that an intoxicated person later came to the scene does not prove that someone had been driving while impaired under *State v. Brown*, 301 N.C. 181; without proof of the corpus delicti the statement of defendant to the patrolman should not have been admitted and there was insufficient evidence to convict the defendant.

Judge BECTON concurring in the result.

Judge MARTIN dissenting.

APPEAL by defendant from *Allen, Judge*. Judgment entered 14 August 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 September 1985.

The defendant was tried for driving while impaired. The State's evidence showed that Horace W. Hall, Jr. was asleep in his home on 13 May 1984 when he heard a "loud noise." He looked out his window and saw an automobile lying upside down in the

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highway. He saw someone leave the automobile. Mr. Hall called the sheriff's department and a deputy arrived ten or fifteen minutes later. A highway patrolman arrived approximately thirty minutes after Mr. Hall had called. R. L. Robinson, a trooper with the highway patrol testified he arrived at the scene at approximately 3:15 a.m. and talked to the defendant at approximately 3:30 a.m. Mr. Robinson testified that the defendant told him he had been driving the automobile at the time of the accident and had not drunk any alcoholic beverage since the accident. In the opinion of Mr. Robinson the defendant was under the influence of alcohol at the time he talked to him. A breathalyzer test was administered to the defendant which showed he had a blood alcohol content of .14%.

The defendant offered no evidence. He was convicted and appealed from the sentence imposed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General W. Dale Talbert, for the State.

Roberts, Cogburn, McClure & Williams, by Max O. Cogburn and Isaac N. Northup, Jr., for defendant appellant.

WEBB, Judge.

The defendant assigns error to the denial of his motion to dismiss. We hold, pursuant to *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983), that we are bound to sustain this assignment of error. In *Brown* our Supreme Court reversed a conviction for unlawful burning of personal property. The evidence in that case showed that a house trailer owned by Cindy Blackman was destroyed by fire. Cindy Blackman had been out of town for two weeks when the fire occurred. Certain items of her clothes, which she testified were in the trailer when she left, were found in the defendant's room. The defendant signed a confession in which he said, "I, Ricky Brown, burnt down a trailer last night at Sid Jones Trailer Park belonging to Cindy." Our Supreme Court held this was not sufficient evidence to support a conviction. It held that in order to prove the corpus delicti which would make the confession admissible the State must first prove that a crime had been committed. It said, "However, the State's evidence was insufficient to show the fire had a criminal origin. In fact it is just as reasonable to assume from the State's evidence that the fire was

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the result of a negligent act or an accident." *Id.* at 183-184, 301 S.E. 2d at 90. Without the confession there was not sufficient evidence to convict Brown.

In this case the evidence without the defendant's statement is that Mr. Hall heard a loud noise, that he saw a vehicle which had been wrecked on the highway in front of his home, and that he saw the defendant who was under the influence of an intoxicating beverage in the area. We do not believe under *Brown* that proof that there was an accident and an intoxicated person later came to the scene proves in this case the crime that someone had been driving while impaired. Without proof of the corpus delicti the statement of the defendant to Mr. Robinson should not have been admitted. There was not sufficient evidence to convict the defendant.

We make a few additional comments in the hope that our Supreme Court will reconsider its position and overrule *Brown*. The author of this opinion was also the author of the opinion in *Brown* when it was in this Court. The panel of this Court which rendered the decision was so certain we were following a well enunciated rule that we affirmed the conviction without a published opinion. We did not understand the rule as to proof of corpus delicti in order to make a confession admissible as it was written in *Brown*.

We followed a rule which we felt was well established in the following cases. *State v. Green*, 295 N.C. 244, 244 S.E. 2d 369 (1978); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908 (1976); *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972); and *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). This rule was stated by Chief Justice Branch in *Thompson* as follows:

Defendant correctly contends that his conviction cannot be sustained upon a naked extrajudicial confession. However, it is equally well settled that if the State offers into evidence sufficient extrinsic corroborative circumstances as will, when taken in connection with an accused's confession, show that the crime was committed and that the accused was the perpetrator, the case should be submitted to the jury.

287 N.C. at 324, 214 S.E. 2d at 755. The defendant in *Thompson* had been convicted of murder. The evidence which Chief Justice

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Branch held corroborated the defendant's confession was that the defendant was found in an automobile similar to the one belonging to the deceased; the defendant had a large sum of money; the defendant had an opportunity to steal the pistol which was shown to have fired the fatal bullets; the defendant had in his possession a pistol which was the same color as the one which fired the bullets into deceased's body; and his girlfriend saw some empty shells in the possession of the defendant. We do not believe this evidence which was relied on to establish the corpus delicti proves a murder had been committed.

In *Whittemore* a defendant was tried for a crime against nature and carnal knowledge of a virtuous girl. A penetration is necessary for a person to be convicted of either crime. The State's witness did not testify that there was a penetration so that there was not proof that a crime had been committed. Our Supreme Court said that this was not enough to convict the defendant of either crime. The defendant confessed, however, and the Court held that the testimony of the State's witness and the confession were enough to sustain the conviction. We believe *Whittemore* contains a square holding that it is not necessary to prove a crime has been committed in order to make the confession admissible. Justice Rodman, writing for the Court said:

A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof aliunde of the corpus delicti. Full, direct, and positive evidence, however, of the corpus delicti is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt.

. . . .

Suffice it to say that the evidence offered by the State was subject to an explanation and interpretation by defendant himself Circumstances capable of an innocent construction may be interpreted in the light of defendant's admissions, and the fact under investigation be thus given a criminal aspect.

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Justice Dan Moore in *Jenerett* quoted *Whittemore* with approval. In *State v. Macon*, 6 N.C. App. 245, 170 S.E. 2d 144 (1969) the defendant was convicted of second degree murder. The State's evidence showed that the skeleton of the victim was found with a bullet hole through her skull. This evidence was held to be sufficient proof of the corpus delicti to make the defendant's confession admissible. Our Supreme Court affirmed this holding at 276 N.C. 466, 173 S.E. 2d 286 (1970). We believe that the fact that there was a bullet hole through the victim's skull did not prove she was murdered. It could have been just as easily inferred that it was an accident or that it was a suicide. We believe *Macon* contains a square holding that it is not necessary to prove a crime has been committed in order to make a confession admissible. Judge Parker, writing for this Court in *Macon*, said:

To establish a prima facie showing of the corpus delicti the prosecution need not eliminate all inferences tending to show a non-criminal cause of death. "Rather, a foundation (for the introduction of a confession) may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency . . . even in the presence of an equally plausible non-criminal explanation of the event."

6 N.C. App. at 253, 170 S.E. 2d at 149.

2 H. Brandis, *Brandis on N.C. Evidence* 2nd Rev. Ed. § 182 at page 65 quotes from Chief Justice Branch's opinion in *Thompson* as to the evidence necessary to make a confession admissible. We believe our Supreme Court in *Brown* has rejected the test as stated in *Brandis*. We believe it has overruled the holdings of *Whittemore* and *Macon* without citing them. We also believe it overruled the language of *Green* and *Jenerett* and the ground on which Chief Justice Branch placed the holding in *Thompson*.

Our Supreme Court dealt with the necessity of proving the corpus delicti to make admissible a confession in *State v. Franklin*, 308 N.C. 682, 304 S.E. 2d 579 (1983). In that case there was evidence that the deceased had been murdered. The Court held this was sufficient proof of the corpus delicti for the admission of a confession to felony murder. The Court cited *Green* and *Thompson* but did not discuss them. It did not cite *Jenerett*, *Whittemore* or *Macon*. The court cited *Brown* with approval.

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We believe that *Brown* marked a radical departure from prior law in this state. We have discussed the proof of corpus delicti necessary to make a confession admissible in the hope that our Supreme Court will reconsider this rule and overrule *Brown*. We believe Chief Justice Branch properly stated the rule in *Thompson* as it then applied and we hope it will be reinstated. Confessions can be good evidence and should not be excluded by a rule which is not supported by reason. It is difficult to explain to the public why our law should say, as it did in *Brown*, that evidence that a woman left her trailer, the trailer was burned, clothes the woman left in the trailer were found in the defendant's possession and the defendant said he burned the trailer is not enough evidence to convict the defendant of burning the trailer. It is equally hard to explain why it should say in this case that evidence that an automobile was wrecked on the highway, that the defendant told a highway patrolman he had driven the automobile and that the defendant was under the influence of alcohol is not sufficient evidence to convict the defendant of driving while impaired. That is what we are forced to hold under *Brown*.

For the reasons stated in this opinion we reverse and remand with an order to dismiss the charge against the defendant.

Reversed and remanded.

Judge BECTON concurs in the result.

Judge MARTIN dissents.

Judge BECTON concurring in the result.

Although I do not agree with the position taken in the majority opinion, I nevertheless concur in the result reached. First, I am not convinced that *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983) was wrongly decided. Because of human frailties and limitations, the guilty are sometimes freed and the innocent are sometimes convicted. Thus, implicit in our criminal justice system is the social contract notion that in exchange for our inability to discover the "absolute" truth, we assure criminal defendants that we will provide them as fair a trial as humanly possible. And so the balance won't be further skewed by whatever inherent advan-

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tage the State may have, we give criminal defendants certain procedural rights, we place the burden of proof on the State, and we give the defendant an absolute right not to testify or present a defense. Had *Brown* been decided differently, defendants would be pressured to take the stand in many instances to explain their insolubly ambiguous statements or testify that their allegedly criminal acts resulted from negligence or accident. This the law does not require.

Second, while *Brown* may be distinguishable from the case at bar when one considers wilfulness or intent necessary for a conviction in *Brown*, I believe it to be a distinction without a difference on the facts of this case. Defendant's extrajudicial confession cannot be used absent either (1) independent evidence of the corpus delicti, or (2) both independent evidence of the trustworthiness of the confession and a showing of criminality on the part of the defendant.

The State's proof regarding the location of the accident and the fact that defendant's father came to the scene with defendant is not determinative. *State v. Franklin*, 308 N.C. 682, 693, 304 S.E. 2d 579, 586 (1983), requires more than "proof of facts and circumstances which add credibility to the confession and generate a belief in its trustworthiness." *Franklin* states that in addition there must be "independent proof of death, injury, or damage, as the case may require, by criminal means . . . [before] [e]lements of the offense may . . . be proved through the statements of the accused." *Id.* The fact that the accident happened farther down Stradley Mountain Road from where (if you use defendant's confession) defendant had attended a party in no way enhances the trustworthiness of defendant's confession as to driving the car. Further, the presence of defendant's father at the scene is not independent evidence of the corpus delicti or of defendant's criminality. It only shows that defendant knew or learned of the accident and went to the scene with his father.

Had Mr. Hall been able to identify defendant as the person who ran from the car, or had one of the presumably several people at the party farther up Stradley Mountain Road testified that defendant left the party driving the car shortly before it overturned, defendant's conviction could have been sustained. On the facts of this case, the State failed to carry its burden or to estab-

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lish that this case is sufficiently distinguishable from *Brown* to permit me to uphold defendant's conviction.

Judge MARTIN dissenting.

I would vote to sustain defendant's conviction of impaired driving. "The corpus delicti rule is based on the hesitancy of the law to accept, *without adequate corroboration*, the extrajudicial confession of a defendant and to avoid convicting a person, solely out of his own mouth, of a crime that was never committed or was committed by someone else." *State v. Franklin*, 308 N.C. 682, 693, 304 S.E. 2d 579, 586 (1983) (emphasis added). I believe that the defendant's statement was sufficiently corroborated by independent evidence so as to establish that it was trustworthy and, therefore, to permit the State to prove, through the statement, the element of defendant's operation of the automobile.

The State's evidence showed that while the investigating officer was at the accident scene on Stradley Mountain Road, the defendant arrived there with his father, approached the officer, and stated that the overturned automobile was his and that he had been the driver. He told the officer that he had been to a party further up Stradley Mountain Road and that after the accident, he had gone home. Only one person exited the automobile after it overturned. The State's proof regarding the location of the accident is corroborative of the defendant's statement as to his activities prior thereto, and, although differing inferences may be drawn from the fact that defendant's father came to the scene with defendant, that fact lends credence to defendant's statement that he had gone to his home after the accident and had returned to the scene. Circumstantial proof of defendant's impairment at the time of driving, and his blood alcohol level at a relevant time thereafter, is supplied by the officer's description of defendant's intoxicated condition at the scene and the results of the subsequent breathalyzer test. The circumstances in corroboration of defendant's statement and the independent proof of his impairment are sufficient to remove any reasonable concern that defendant might be convicted, through his unsolicited admission, of an offense which had not been committed, or had been committed by someone else.

Evidence very similar to that in the case *sub judice* has been held sufficient to overrule a motion for dismissal. In *State v.*

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Snead, 295 N.C. 615, 247 S.E. 2d 893 (1978), the State's evidence showed that the investigating highway patrolman arrived at the scene of a one-car accident and found several people milling around the automobile. Snead told the officer that he was the driver of the wrecked car. The officer, being of the opinion that Snead was intoxicated, arrested him and a subsequent breathalyzer test indicated that defendant's blood alcohol content was .21%. Though the corpus delicti rule was not discussed, the Supreme Court held the evidence sufficient to warrant denial of Snead's motion for non-suit. The State's evidence in this case was likewise sufficient to overrule Trexler's motion for dismissal.

STATE OF NORTH CAROLINA v. MICHAEL ALLEN STAFFORD

No. 848SC1098

(Filed 1 October 1985)

Criminal Law § 53; Rape and Allied Offenses § 4— medical testimony—victim's symptoms of rape trauma syndrome inadmissible hearsay

Testimony by a pediatrician concerning symptoms of rape trauma syndrome an alleged rape victim told him she had was not admissible under G.S. 8C-1, Rule 803 but was inadmissible hearsay where his examination of the victim was conducted in preparation for trial and not for purposes of diagnosis and treatment. Furthermore, the pediatrician's testimony was not admissible to corroborate the victim because it went far beyond the victim's testimony.

Judge BECTON concurring in result.

Judge MARTIN dissenting.

APPEAL by defendant from *Lewis, Judge*. Judgment entered 18 July 1984 in Superior Court, WAYNE County. Heard in the Court of Appeals 20 August 1985.

The defendant was tried for second degree rape and taking indecent liberties with a minor. Tammy Ingram, a 14 year old girl, testified that on 9 December 1983 she spent the night in the home of her aunt, Sally Stafford, and her uncle, Michael Stafford. She testified further that she awoke after the defendant entered her room at which time he raped her. She did not tell anyone of the incident until 11 January 1984. On that day she told a friend who insisted that Tammy Ingram tell her mother. On 12 January

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1984 Tammy Ingram's mother took her to the office of Dr. Joseph Ponzi. She did not see Dr. Ponzi again until Friday, 13 July 1984, when she returned to his office. The trial of this case commenced on 16 July 1985. She testified that in December 1983 she weighed 125 pounds and weighed between 110 and 115 pounds at the time of the trial. She also testified that her grades in school went down after she had been raped.

Dr. Joseph Ponzi, a pediatrician, testified that on 12 January 1984 Tammy Ingram and her mother came to his office. He examined Tammy Ingram on that date and saw her again on 13 July 1984. The defendant objected to testimony by Dr. Ponzi as to a rape trauma syndrome and the court conducted a voir dire hearing out of the presence of the jury. Dr. Ponzi testified at the voir dire hearing that a rape trauma syndrome is a condition with a well recognized complex number of symptoms. There have been several articles on it which have been published in medical journals. He said he could not form an opinion as to whether Tammy Ingram had a rape trauma syndrome but he could state what the symptoms are and what are the symptoms he found in Tammy Ingram. Dr. Ponzi then testified before the jury that a rape trauma syndrome is a list of symptoms or a symptom complex that is attributable to people who have been raped. He said, "It shows such things as musculoskeletal complaints, headaches, vomiting, weight loss, vaginitis, dysmenorrhea, emotional turmoil. These kids often, or adolescents are often depressed, very emotional, labile; other things, they feel guilty, anxious, self depreciating themselves." He testified that on 13 July 1984 Tammy Ingram told him she had a 15 pound weight loss between December and February, that she had been vomiting, that she cried a great deal, was emotionally labile, had a decreased school performance, had nightmares and dreamed about the incident.

The defendant testified that he had not had sexual relations with Tammy Ingram at any time. His wife testified that she slept in the same bed as the defendant on the night of 9 December 1983 and that she heard no commotion that night. She also testified that Tammy behaved normally the next morning. The defendant introduced evidence of his good character and reputation.

The defendant was convicted of second degree rape and was sentenced to twelve years in prison. He appealed.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General Alfred N. Salley, for the State.

Barnes, Braswell & Haithcock, by R. Gene Braswell and S. Reed Warren, for defendant appellant.

WEBB, Judge.

The appellant's only assignment of error is in regard to Dr. Ponzi's testimony in regard to the rape trauma syndrome. We believe this assignment of error has merit. Dr. Ponzi testified as to the symptoms of rape trauma syndrome. He then testified as to the symptoms Tammy Ingram told him on 13 July 1984 that she had. If this testimony was introduced to prove the symptoms which Tammy Ingram had so that the jury could then determine whether she had a rape trauma syndrome it was hearsay testimony. It was offered to prove the truth of what Tammy Ingram told Dr. Ponzi. See G.S. § 8C-1, Rule 801(c) for a definition of hearsay. We do not believe this testimony was admissible under any exception to the hearsay rule. G.S. § 8C-1, Rule 803 provides in part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(4) Statements for Purposes of Medical Diagnosis or Treatment—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

We do not believe this exception is applicable in this case. It is obvious that Tammy Ingram went to Dr. Ponzi on 13 July 1984 in preparation for going to court. She did not go for treatment. We do not believe we should hold she went for diagnosis. The commentary says this exception to the hearsay rule is based on the strong motivation for truthfulness when a patient is seeking treatment from a physician. For this reason we believe the diagnosis for which the exception to the hearsay applies should be a diagnosis for the purpose of treating a disease.

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If the testimony were offered for the purpose of corroborating Tammy Ingram's testimony it would not be hearsay. Nevertheless a good part of it should have been excluded because Dr. Ponzi's testimony did not corroborate Tammy Ingram's testimony. Tammy Ingram testified that between December 1983 and July 1984 her weight went from 125 pounds to between 110 and 115 pounds. She also testified she made lower grades in school. Dr. Ponzi testified that she told him that she had a 15 pound weight loss, that she had been vomiting, that she cried a great deal, was emotionally labile, had a decreased school performance, had nightmares and dreamed about the incident. This testimony went far beyond corroborating the testimony of Tammy Ingram. It was error to admit it. *See State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). We hold this is an error requiring a new trial.

New trial.

Judge BECTON concurs in the result.

Judge MARTIN dissents.

Judge BECTON concurring in the result.

Considering the current social science and medical research on rape trauma syndrome, I conclude that Dr. Ponzi's testimony about rape trauma syndrome was reversibly prejudicial. First, although it may be a therapeutic tool, the rape trauma syndrome has not gained acceptability as a socio-medical scientifically reliable means for proving that a rape occurred. As the Minnesota Supreme Court said in *State v. Saldana*, 324 N.W. 2d 227, 229-30 (1982):

Rape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred. The characteristic symptoms may follow *any* psychologically traumatic event. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 236 (3d ed. 1980). At best, the syndrome describes only symptoms that occur with some frequency, but makes no pretense of describing every single case. C. Warner, *Rape and Sexual Assault* 145 (1980).

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Some suggest that there are as many as fifty symptoms of the rape trauma syndrome today, many of which would be applicable to hijack victims, prisoners of war, kidnap victims, as well as others who have been subjected to psychologically traumatic events. Second, Dr. Ponzi did not testify about the reliability or validity of the rape trauma syndrome evidence in this case. Third, the history and purpose of the rape trauma syndrome concept suggests that it was not designed to prove that a rape in fact occurred. As the California Supreme Court observed in *People v. Bledsoe*, 36 Cal. 3d 236, 249-50, 203 Cal. Rptr. 450, 459, 681 P. 2d 291, 300 (1984):

Unlike fingerprints, blood tests, lie detector tests, voiceprints or the battered child syndrome, rape trauma syndrome was not devised to determine the "truth" or "accuracy" of a particular event—i.e., whether, in fact, a rape in the legal sense occurred—but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients. . . . [R]ape counselors are taught to make a conscious effort to avoid judging the credibility of their clients. . . . "[W]hen a psychologist becomes judgmental, he/she has become entrapped in a major pitfall. . . ."

Thus, as a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions.

(quoting Kilpatrick, *Rape Victims: Detection, Assessment and Treatment* (Summer 1983) *Clinical Psychologist* 92, 94) (citation omitted). Finally and significantly, defendant did not raise "consent" as a defense. Use of the rape trauma syndrome when a defendant contends the victim consented is not as problematical as use of the syndrome when, as in the instant case, the defendant contends he did not engage in sexual intercourse with the victim. That is, when a defendant does not contest the fact that a rape occurred, but merely denies he committed it, rape trauma syndrome evidence may be irrelevant and prejudicial.

Although set in print, these words are not figuratively cast in stone for eternity. When, and if, the methodological flaws in

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rape trauma syndrome studies are avoided and the rape trauma syndrome gains general acceptance as a non-prejudicial tool to inform jurors about what course of action they should take, I would not hesitate to re-evaluate the position I take today.

Believing the jury could have been misled by Dr. Ponzi's testimony, even though he offered no opinion, and that the danger of unfair prejudice outweighs any probative value the evidence may have had, I concur in the result.

Judge MARTIN dissenting.

I disagree with the majority's conclusion that Dr. Ponzi's testimony as to Tammy Ingram's symptoms, as related to him by Tammy and her mother, was inadmissible hearsay. I would find that his testimony was admissible as substantive evidence under G.S. 8C-1, Rule 803(4). Rule 803(4) excludes from the hearsay rule: "[s]tatements made for the purposes of medical diagnosis or treatment and describing medical history, or *past or present symptoms*, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." (Emphasis added.) The reason for the admission of such statements is grounded upon their reliability due to the declarant's motivation to assist the physician in diagnosis or treatment. Not only are statements by the patient admissible, but a statement made to a physician by a third person as to the patient's symptoms would also be admissible if made for purposes of diagnosis and treatment of the patient, and if the court determines that the statement is likely to be reliable. 4 J. Weinstein & Berger, Weinstein's Evidence p. 803-4[01] at 145 (1985). "In the case of a child, a court would undoubtedly assume the absence of any motive to mislead on the part of his parents." *Id.*

The majority opinion narrowly interprets Rule 803(4) as applying solely to "a diagnosis for the purpose of treating a disease." Such a restrictive interpretation obviously excludes statements reasonably pertinent to diagnosis or treatment of other medical conditions, *e.g.*, broken bones, drug and alcohol addiction and psychological disorders. I would not so restrict the interpretation of the rule, but would instead apply the following test to determine the admissibility of the declarant's out of court

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statement: is the declarant motivated to tell the truth because diagnosis or treatment depends on what she says; and is it reasonable for the physician or health care provider to rely on this information in diagnosis or treatment. See *United States v. Iron Shell*, 633 F. 2d 77 (8th Cir. 1980).

The majority also states that it is obvious that Tammy Ingram's visit to Dr. Ponzi on 13 July 1984 was "in preparation for going to court" rather than diagnosis or treatment. I see nothing in the record to indicate that the reason for her visit was solely in preparation for Dr. Ponzi's court testimony rather than for assistance with the symptoms described by Tammy and her mother. The mere fact that both declarants were aware of the pending court proceeding does not render inadmissible their statements to him made for a medical purpose. Dr. Ponzi testified that he attempted to make a medical diagnosis. Both Tammy and her mother responded to questions asked by Dr. Ponzi and their answers provided him with information as to Tammy's physical, emotional and mental well-being; information which could serve as a basis for diagnosis and treatment of her condition. As such, the statements were within the scope of admissible hearsay permitted by Rule 803(4). See *United States v. Iron Thunder*, 714 F. 2d 765 (8th Cir. 1983); *State v. Hebert*, 480 A. 2d 742 (Me. 1984).

The concurring opinion finds error in the admission of Dr. Ponzi's testimony concerning the symptoms comprising "rape trauma syndrome." In my view this testimony was relevant and its admission was not an abuse of the trial court's discretion.

Dr. Ponzi was accepted by the court as an expert witness in the field of pediatric medicine and testified that he had treated many patients, from infants to college age, upon complaints of sexual abuse. He testified that he is familiar with the complex number of symptoms medically recognized as rape trauma syndrome. He testified as to what those symptoms were and also testified as to the symptoms exhibited by Tammy Ingram, as related to him by Tammy and her mother. He did not testify that Tammy's symptoms were produced by rape, or that her disorder resulted from sexual abuse at the hands of defendant. He did not express an opinion that Tammy Ingram suffered from rape trauma syndrome.

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Expert testimony regarding the symptoms of an alleged victim's psychological response to rape or sexual assault has been admitted in several jurisdictions, *State v. Middleton*, 294 Or. 427, 657 P. 2d 1215 (1983); *State v. Marks*, 231 Kan. 645, 647 P. 2d 1292 (1982); *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S. 2d 741 (1984) and rejected in others, see *State v. Saldana*, 324 N.W. 2d 227 (Minn. 1982); *State v. Allewalt*, 61 Md. App. 503, 487 A. 2d 664 (1985). Admission of such evidence has been advocated by some legal authors, see Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395 (1985) and criticized by others, see Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 Va. L. Rev. 1657 (1984). Until now, however, the issue has not been addressed by North Carolina's appellate courts.

I would hold such expert testimony admissible. There is recognized scientific authority for the medical conclusion that there exists a complex and unique number of physical and emotional symptoms exhibited by victims of rape, which are similar, but not identical, to other post-traumatic stress disorder symptoms. Massaro, *supra* (reviewing scientific studies). An understanding of those symptoms, the unique reactions of victims of rape, is not within the common knowledge or experience of most persons called upon to serve as jurors. Therefore, expert testimony as to the symptoms of the syndrome and its existence, is admissible to assist the jurors in understanding the evidence and in drawing appropriate conclusions therefrom. G.S. 8C-1, Rule 702; *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978) ("battered child syndrome," expert testimony admissible).

To say that such evidence is irrelevant misinterprets relevance. G.S. 8C-1, Rule 401 makes relevant "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Just as evidence of physical injury has been admissible as relevant to the issue of rape, so should evidence of emotional injury to the victim be relevant to show that it is more likely that a rape occurred. Neither should the expert testimony be excluded on the grounds of unfair prejudice. In my view, the admission of expert testimony as to the

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symptoms or existence of rape trauma syndrome is no more inflammatory, prejudicial or invasive of the province of the jury as the judges of credibility and fact than any other expert testimony.

I would hold that there was no error in the admission of Dr. Ponzi's testimony.

STATE OF NORTH CAROLINA v. D. K. DIXON, JR.

No. 8412SC1142

(Filed 1 October 1985)

1. Assault and Battery § 14— communicating threats—sufficient evidence

The evidence was sufficient to support defendant police officer's conviction of communicating threats to the driver and a passenger in a car by pointing a gun at them and threatening to blow their heads off while the officer was investigating the occupants of the car because of an alleged traffic violation.

2. Criminal Law § 89.6; Witnesses § 6— pending civil litigation—competency to show bias

In a prosecution of a law officer for communicating threats, evidence of pending civil litigation filed by one prosecuting witness against defendant was admissible to show bias or interest of the prosecuting witnesses, and the exclusion of such evidence was prejudicial to defendant because the State's case against defendant hinged on the credibility of the prosecuting witnesses.

3. Criminal Law § 86.5— impeachment of defendant—prior uses of excessive force

In a prosecution of a law officer for communicating threats, cross-examination of defendant concerning his alleged prior uses of excessive force was permissible for impeachment purposes where there is nothing in the record that shows the questions were asked in bad faith.

4. Criminal Law § 34.8— other altercations—incompetent to show common plan or scheme—disposition to commit offense charged

In a prosecution of a law officer for communicating threats, testimony concerning defendant's altercation with one witness sixteen months prior to the incident in question and his altercation with another witness two days before the incident did not come within the exception permitting evidence of other crimes or misconduct to show a common plan or scheme. Rather, such testimony tended only to show defendant's disposition to commit the offenses charged, and its admission was prejudicial error.

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APPEAL by defendant from *Preston, Judge*. Judgment entered 8 June 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 21 August 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General Guy A. Hamlin for the State.

Barrington, Jones, Armstrong & Flora by Carl A. Barrington, Jr.; and Larry McGlothlin for the defendant appellant.

COZORT, Judge.

Defendant was charged with the misdemeanors of communicating threats (G.S. 14-277.1) and assault by pointing a gun (G.S. 14-34) against the person of Ernest Parker and with communicating threats and assault with a deadly weapon (G.S. 14-33(b)(1)) against the person of James Parker. Defendant pled not guilty to all four charges. The jury found the defendant guilty on both counts of communicating threats and not guilty of the other two charges. Defendant was sentenced to a six-month active term. Defendant appeals from the judgment claiming, among other assignments of error, that it was prejudicial error for the court (1) to allow the State's motion *in limine* thereby excluding evidence at trial of pending civil litigation between one of the prosecuting witnesses and defendant and (2) to allow the State on rebuttal, over defendant's objections, to present witnesses who testified about collateral matters contradicting defendant's testimony. For the reasons stated below, we grant a new trial.

The evidence presented by the State at trial tended to show the following: On 25 October 1983, at about 3:30 in the afternoon, prosecuting witness James Parker and his wife drove their son, prosecuting witness Ernest Parker, to East Fayetteville to visit his friends. Ernest, who is twenty-three years old, is crippled by arthritis and walks with crutches. His parents dropped him off at Williford's Seafood. According to Ernest's testimony he spent the afternoon and evening visiting with friends in the area.

Sometime after 11:00 that evening, Ernest called home and asked his father to come get him. James left home to pick up his son accompanied by Gary Stewart, a friend of the family who was visiting at the time. James returned to the area around Williford's where he had left his son that afternoon. James pulled

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over to the side of the road, spotted his son at a nearby house, put on his flasher lights, and he and Stewart got out of the car to go assist Ernest.

The three men got back in the car. James drove, Ernest sat beside him, and Stewart sat in the back seat. Ernest asked his father to go to the Hardee's down the street because he was hungry. They drove down Grove Street, got in the left-hand lane, and when they were opposite Hardee's, turned left over the median into Hardee's driveway. Then they drove up to the take out window and began to place their order. A few minutes later Police Officer Dixon, defendant here, approached the Parker vehicle and asked James to produce his driver's license and automobile registration. As James reached for the requested documents, Officer Dixon pulled his gun, pressed it up against James Parker's mouth and said, "Don't move. I'll blow your fucking brains out." Officer Dixon repeated this threat several times over the next few minutes. According to testimony, defendant pressed the gun up against James Parker's mouth in such a way that it caused his mouth to bleed.

Officer Dixon asked Parker to pull over into a parking spot because they were blocking traffic to the take out window. Defendant got James out of the car. Defendant then holstered his gun, searched Parker and administered a sobriety test. Ernest got out of the car and objected to defendant about the "mistreatment" of his father. Defendant issued a citation for, "[d]riv[ing] said vehicle over and across a curb on said highway in violation of G.S. 20-140.3." A motion to quash was allowed by Judge Cherry when the matter came to court on 8 November 1983.

The Parkers testified that a bayonet purchased at a flea market was in the car, lying on the dashboard in open view at the time they were approached by defendant.

After he took the citation from Officer Dixon, James Parker told Dixon he would like to talk to someone about defendant's treatment of him. Dixon told him to talk to his commanding officer. The Parkers and Stewart went to the Law Enforcement Center where they complained to the "desk sergeant" and later Sgt. Sessoms about how defendant had treated them.

Defendant presented evidence which tended to show the following: He observed a Ford LTD unattended with the motor

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running in front of a known "drug house." Shortly thereafter defendant watched as the car pulled away from the house. He followed the car as it proceeded erratically down the road. Officer Dixon checked the license plate with police headquarters and found that it had been issued to a 1974 Chevrolet and not a Ford LTD. The Ford was driven across a raised median strip into a Hardee's on the other side of the street. Officer Dixon followed the car into Hardee's with the intention of stopping it. Defendant "figured" that the erratic driving, the questionable plates, and driving over the median gave him probable cause to stop the driver of the Ford.

Officer Dixon approached the vehicle while it was stopped in the take out lane. He asked the driver, who was James Parker, to let him see his license and the automobile registration. Noting that they were in the way of other traffic, Officer Dixon asked Parker to pull his car over to the side of the parking lot. When the Parker car came to a halt, Officer Dixon approached the car again and observed the bayonet on the dash, which alerted him that there might be other weapons in the car. He asked all three men to put their hands where he could see them. James Parker and Gary Stewart cooperated, but Ernest Parker said irately, "What you stopping us for? What the fuck is going on?" Officer Dixon noticed an odor of alcohol emanating from the car. Defendant again requested to see James' driver's license and automobile registration. Ernest made an abrupt move in the direction of the bayonet on the dash. Thinking he was in jeopardy, Officer Dixon drew his gun and pointed it at Ernest and told him he "would blow his fucking head off." Defendant felt he needed to take strong measures to regain control of the situation. Ernest put his hands on the dash. At that point Officer Dixon helped James Parker out of the car, searched him, gave him a sobriety test and wrote out a citation for crossing the median.

[1] First, we address defendant's contention that the evidence was insufficient to go to the jury on the communicating threats charges.

Upon a motion to dismiss in a criminal action, "all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies

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and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977). A review of the record in light of the above-quoted standard reveals that the evidence was more than sufficient to go to the jury on the communicating threats charges. We overrule this assignment of error.

[2] Next, we consider whether the trial court erred in granting the State's motion *in limine* to suppress evidence of pending civil litigation filed by State's witness James Parker against the defendant.

On 13 March 1984 James Parker filed suit in federal court against the defendant, the City of Fayetteville, and others seeking \$5,000,000.00 in compensatory and punitive damages for violation of his civil rights under 42 U.S.C. Sec. 1983. That suit was pending at the time this criminal action was tried and is based on the same acts involved in the criminal action. Prior to empaneling the jury, the State orally moved the court to prohibit the defendant from mentioning any civil litigation between the parties. The court allowed the motion. Defendant argues that it was prejudicial error to allow the motion because evidence of the civil suit, filed by prosecuting witness James Parker against the defendant, is admissible to show that James Parker, his son Ernest Parker, and close family friend Gary Stewart have a bias or interest in the outcome of the criminal action. We agree.

In *State v. Hart*, 239 N.C. 709, 711, 80 S.E. 2d 901, 902 (1954), our Supreme Court held that:

A party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation. [Citations omitted.] Under this rule, a witness for the prosecution in a criminal case may be compelled to disclose on cross-examination that he has brought, or is preparing to bring a civil action for damages against the accused based on the acts involved in the criminal case.

Thus, as in *Hart*, the "exclusion of the facts relating to the civil [action]" brought by James Parker against defendant "constituted

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prejudicial error [and necessitates] a new trial." *Id.*, 239 N.C. at 713, 80 S.E. 2d at 904. The exclusion of the facts relating to the civil action was particularly prejudicial to the defendant because the State's case against the defendant hinged on the credibility of the Parkers and Stewart.

Having ordered a new trial we now turn to two issues likely to arise on retrial.

[3] Defendant argues that it was prejudicial error for the trial court to allow the State to cross-examine the defendant about alleged prior use of excessive force and to allow the State on rebuttal, through the testimony of witnesses James Bradford, James Steven Lee, and Nancy Crittenden, to introduce evidence of two of these prior bad acts allegedly committed by the defendant.

On cross-examination defendant was asked about his uses of excessive force, while a police officer, against five citizens. The defendant denied the accusations and testified that he did not recall James Steven Lee, and did not recall pushing him against the car; he did not place a gun against the head of Ellis McPherson and tell him he "would blow his fucking brains out"; he did not remember pulling his gun on Charles Henry Davis and telling him he would "blow his fucking brains out"; he did not throw a Mr. Bradford up against the car; and he did not slam Eddie McLean against the pavement and give him "body shots." Defendant moved to strike these questions by the State with regard to these alleged prior bad acts but the court denied the motion and defendant excepted.

On rebuttal the State called James Steven Lee, James Markham Bradford, and Nancy Crittenden to testify about two of these alleged prior acts of misconduct. James Steven Lee testified, in substance, that in June of 1982 he was stopped by the defendant for running a red light; that during the course of the detention defendant threw him against the hood of the car and physically and verbally abused him. James Bradford testified that on 24 October 1983 (two days before the incident with the Parkers), he was stopped by defendant, and during the course of the stop defendant approached him and said "shut your goddam mouth and put your fucking hands on the car." Defendant grabbed him by the back of the pants, pushed him against the car

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and kicked his legs apart when he could not spread them any further apart. Mr. Bradford was charged with careless and reckless driving and carrying a concealed weapon. Nancy Crittenden, who was riding with Bradford, corroborated Mr. Bradford's version of the incident. Defendant objected and excepted to the testimony of witnesses Lee, Bradford and Crittenden.

We first address the cross examination of defendant. When a defendant testifies in a criminal case he may be cross-examined, for impeachment purposes, concerning prior acts of misconduct, even if he had not been convicted therefor, so long as the questions are asked in good faith. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982); *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982). There is nothing in the record which shows the questions concerning the alleged prior bad acts were asked in bad faith; therefore, the questions are presumed proper. *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981). Furthermore, the prosecutor's questions were "competently tailored to elicit [the defendant's] affirmance or denial of 'some identifiable specific act' by means of a *detailed* reference to 'the time or the place or the victim or . . . circumstances of defendant's alleged prior misconduct.'" *State v. Shane, supra*, 304 N.C. at 652, 285 S.E. 2d at 819, *quoting State v. Purcell*, 296 N.C. 728, 732-33, 252 S.E. 2d 772, 775 (1979). The propriety or unfairness of cross-examination rests largely in the trial judge's discretion, therefore, "[h]is ruling thereon will not be disturbed without a showing of gross abuse of discretion." *State v. Calloway, supra*, 305 N.C. at 752, 291 S.E. 2d at 626, *quoting State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977). Defendant has shown no abuse of discretion here. We hold there was no error in allowing the State to cross-examine the defendant concerning his alleged prior uses of excessive force.

[4] The testimony of witnesses Lee, Bradford, and Crittenden, however, is a different matter. It "is well settled in this jurisdiction that, though a witness's character or propensity for telling the truth is subject to impeachment through cross-examination about specific instances of misconduct . . . the witness's answers to such questions are conclusive, and he may not be further impeached or contradicted through the introduction of *any* kind of extrinsic evidence." *State v. Shane, supra*, 304 N.C. at 652-53, 285 S.E. 2d at 819. Evidence that defendant has committed other criminal offenses or misconduct "is inadmissible on the issue of

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guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows guilt of another crime." *State v. Barfield*, 298 N.C. 306, 325, 259 S.E. 2d 510, 527 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050 (1980). Therefore, if such evidence is logically relevant to issues "concerning knowledge, identity, intent, motive, plan or design, [or] connected crimes . . .", it is admissible provided that it affirmatively appears that the probative value of such evidence outweighs its prejudicial effect. *State v. Shane, supra*, 304 N.C. at 654, 285 S.E. 2d at 820. Here the State relies primarily on the common plan or scheme exception for the admission of Lee's, Bradford's, and Crittenden's testimony. We are unpersuaded that their testimony fits into any of the exceptions as listed above and first listed in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In *State v. McClain* the common plan or scheme exception is explained as follows: "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." 240 N.C. at 176, 81 S.E. 2d at 367. In *State v. Barfield, supra*, the court explained the common plan or scheme exception this way: "Evidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step." 298 N.C. at 329, 259 S.E. 2d at 529.

When evidence is offered under the common plan or scheme exception it must be

examined with special care to see that it is really relevant to the establishment of a design or plan rather than merely showing character or a disposition to commit the offense charged. [Citation omitted.] A mere similarity in results is not a sufficient basis upon which to receive evidence of other offenses. Instead, there must be such a concurrence of common features that the assorted offenses are naturally explained as being caused by a general plan.

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State v. Barfield, supra, 298 N.C. at 329, 259 S.E. 2d at 530. In close cases the defendant must be given the benefit of the doubt and evidence of other crimes or wrongs must be excluded. *State v. Shane, supra*. Here, the testimony (1) concerning defendant's altercation with Lee, some sixteen months prior to the incident with the Parkers, and (2) defendant's altercation with Bradford, some two days before the incident with the Parkers, does not tend to prove a common plan or scheme to commit the offense charged. The testimony does not reveal a concurrence of common features so that the assorted prior bad acts are naturally explained as being caused by a general plan. Rather, at most, the testimony concerning the prior bad acts shows defendant's disposition to commit the offenses charged. Its admission was prejudicial error.

Defendant also assigns as error (1) the trial court allowing the State to amend the warrants to change the name of the defendant from "D. K. Dixon" to "D. K. Dixon, Jr."; and (2) the trial court "refusing to set the verdict aside as being contrary to the evidence and law in the case on the grounds that the jury verdict constituted a merger of the assault and the communicating charge, and a not guilty verdict on the assault charge was in law an acquittal of the communicating charges." We find these assignments of error to be without merit.

It is unnecessary to discuss defendant's remaining assignments of error for it is unlikely such issues will arise upon a

New trial.

Chief Judge HEDRICK and Judge ARNOLD concur.

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STATE OF NORTH CAROLINA v. KENNETH RANDALL HOLLINGSWORTH

No. 8426SC1109

(Filed 1 October 1985)

1. Automobiles and Other Vehicles § 114; Homicide § 23.2— involuntary manslaughter arising from automobile accident—failure to instruct on contributory negligence of victims—no error

In a prosecution for involuntary manslaughter and driving under the influence arising from an automobile accident, the trial court did not err by failing to instruct the jury on the contributory negligence of the passengers in defendant's car in that they voluntarily accepted a ride with a visibly drunken driver. While the jury could find negligence on the part of the passengers, this negligence would be at most a concurring proximate cause of the passengers' deaths and would not insulate defendant from criminal liability.

2. Automobiles and Other Vehicles § 114; Homicide § 23.2— involuntary manslaughter arising from automobile accident—failure to instruct on contributory negligence of victims—erroneous

In a prosecution for involuntary manslaughter and driving under the influence arising from an automobile accident, the jury should have been instructed to consider the possibility that the negligence of the driver of a car with which defendant collided was an insulating cause of the deaths of the two passengers in defendant's car where the driver testified that there was a two to three second time lapse from when he saw defendant's car to when he collided with it. Whether the driver was negligent in not applying the brakes or attempting to swerve around defendant's car, and whether that negligence constituted the sole proximate cause of the deaths of the passengers in defendant's car, are questions for the jury to decide.

3. Automobiles and Other Vehicles § 126.2— DWI—blood sample drawn from unconscious defendant—test results admissible

A blood alcohol test performed on blood seized from an unconscious defendant who had not been arrested did not violate defendant's rights under the Fourth Amendment of the U. S. Constitution and Art. I, § 20 of the North Carolina Constitution because the extraction of blood may be characterized as a "slight intrusion," the body's breakdown of alcohol in the blood creates the reasonable risk that the evidence of intoxication will be quickly destroyed, and there was probable cause to arrest defendant at the time the blood sample was drawn in that defendant had been involved in an accident in circumstances indicating an impairment of coordination, the officer smelled the odor of alcohol from the crushed passenger side of defendant's car, the two passengers were not breathing and defendant was gasping for breath, beer cans on the floor were unopened and could not contribute to the odor, and there was no testimony concerning any dampness or puddles that would indicate spilled beer. G.S. 20-16.2.

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APPEAL by defendant from *Lewis (Robert D.)*, Judge. Judgment entered 15 June 1984 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 20 August 1985.

Defendant was indicted on two counts of involuntary manslaughter and one count of driving under the influence.

The State's evidence tended to show the following facts and circumstances. At about midnight on the night of 31 July 1983, Kenneth R. Hollingsworth was driving a 1968 Chevrolet automobile in the outside northbound lane of South Boulevard, a four-lane street in Charlotte. There were two passengers in the front seat of the automobile: Michael Wayne McCarty and Brian Lee Keel. Samuel Cunningham, the driver of a 1979 Datsun, was in the inside lane. Hollingsworth pulled past the Datsun and attempted to change into the left lane. He did not leave enough room behind his automobile and the left rear bumper of his Chevrolet hooked onto the right front bumper of the Datsun. As Hollingsworth continued to move into the left lane, the Datsun was pushed up onto the median and the two cars separated. As Cunningham attempted to move back into a northbound lane, the Chevrolet passed in front of him, crossing over the median and becoming "airborne." The Chevrolet landed in a southbound lane, where a collision took place with a 1972 Buick driven by Jerry L. Pew.

Officer B. J. Tessnier arrived on the scene almost immediately afterward. Inside the Hollingsworth Chevrolet he noticed the two passengers, who were not breathing. Hollingsworth was unconscious but breathing heavily. Although Officer Tessnier did not actually smell defendant's breath, he did notice the odor of alcohol inside the vehicle. There were unopened cans of beer on the back seat floorboard.

The Emergency Medical Service declared the two passengers, Keel and McCarty, dead on the scene, applied first aid to Hollingsworth, and transported him to the Charlotte Memorial Hospital emergency room. At about 2:00 a.m., Officer Tessnier arrived at the hospital and asked Brenda Dasher, a nurse, for a blood alcohol sample. She drew two vials of blood from defendant's left hand. Defendant was unconscious during this full period. At no time that night did Officer Tessnier indicate that defendant was in custody or that he would be arrested when he

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awakened. Analysis of this blood sample indicated a blood alcohol level of .19 milligram percent. Warrants for Hollingsworth's arrest on charges of involuntary manslaughter were issued 29 August 1983. True bills of indictment were sworn on 12 December 1983.

The defendant testified that he had consumed six or seven beers that day, beginning at one o'clock in the afternoon and ending around nine or ten o'clock that evening. He also testified that when the Chevrolet scraped the Datsun, McCarty, who was seated in the middle, next to defendant, jerked the wheel to the right, causing defendant, in his surprise, to jerk the wheel back the other way, sending the Chevrolet over the median. The car landed in the southbound lane and stalled. Defendant was attempting to restart the automobile when the collision occurred with the Buick driven by Jerry Pew. Defendant also testified that the street was well-lighted, enough so that he could not tell if his headlights had remained in operating condition after the car stalled.

Additional facts will be related as analysis requires.

The jury returned a verdict of guilty of driving with a blood alcohol content of .10% or more by weight and two counts of involuntary manslaughter. Defendant received two sentences of seven years, to run concurrently. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Fred R. Gamin, for the State.

Flanary & Davies, by Kenneth T. Davies, for defendant.

WELLS, Judge.

I.

[1] Defendant's first arguments concern the trial court's failure to instruct the jury on the negligence of Brian Lee Keel, Michael Wayne McCarty and Jerry L. Pew.

Contributory negligence is no defense in a criminal action. However, in a case in which defendant is charged with manslaughter by reason of his alleged culpable negligence, the negligence of a person fatally injured, or of a third per-

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son, is relevant and material on the question of proximate cause. . . .

State v. Tioran, 65 N.C. App. 122, 308 S.E. 2d 659 (1983), citing *State v. Harrington*, 260 N.C. 663, 133 S.E. 2d 452 (1963). Therefore, if there is sufficient evidence to create in the minds of the jury a reasonable doubt that the acts of defendant constituted a proximate cause of death, defendant should be acquitted. *State v. Harrington*, *supra*. In order for negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains a proximate cause, sufficient to find him criminally liable. See *State v. Ellis*, 25 N.C. App. 319, 212 S.E. 2d 909 (1975). There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to, that is, proximately caused, the death. *State v. Cummings*, 301 N.C. 374, 271 S.E. 2d 277 (1980).

The negligence of Brian Lee Keel and Michael Wayne McCarty upon which defendant requested a charge to the jury was Keel's and McCarty's voluntary acceptance of a ride with a visibly drunken Hollingsworth at the wheel.¹ While the jury could find negligence on the part of Keel and McCarty, see *Beam v. Parham*, 263 N.C. 417, 139 S.E. 2d 712 (1965), this negligence would be, at most, a *concurring* proximate cause of the deaths of Keel and McCarty, and would not insulate defendant from criminal liability. Thus, the trial court's failure to instruct the jury on this issue was not error.

[2] A different conclusion holds true on the issue of Jerry Pew's negligence. A motorist is required in the exercise of due care to keep a reasonable and proper lookout in the direction of travel and is held to the duty of seeing what he ought to have seen. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984). The failure to do this may break the chain of causation of the original negligent actor. See *id.* Jerry Pew's own testimony was that there was a two to three second time lapse from when he saw the Chevrolet to when he collided with it. De-

1. The trial court included in its charge to the jury an instruction that the jury could find that Michael McCarty jerked defendant's steering wheel and that that action could constitute insulating negligence.

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fendant testified that the time from when the Chevrolet stalled in the southbound lane to when the collision occurred was five to ten seconds. Samuel Cunningham testified that thirty seconds passed from the time of the scraping of his bumper to the time of the collision in the southbound lane. Defendant also testified that the street was well-lighted. It is unclear whether the Chevrolet's lights were operating at the time and there was no testimony as to weather conditions. The speed limit along that stretch of South Boulevard is forty-five miles per hour.

Even assuming Pew's own evidence as true, there might still have been enough time for him to apply the brakes or swerve around the Chevrolet, neither of which Pew attempted. Whether Pew was negligent and, if so, whether his negligence constituted the *sole* proximate cause of the deaths of Keel and McCarty are questions that are for the jury to decide. See *Hairston v. Alexander Tank & Equipment Co.*, *supra*. The jury should have been instructed to consider the possibility of Jerry Pew's negligence as an insulating cause of the two deaths. For this reason we must grant a new trial.

II.

[3] Defendant next contends that the trial court erred in failing to suppress, as the fruit of an illegal seizure, the blood alcohol test performed on the blood sample taken from the unconscious defendant. This issue is one of first impression in North Carolina and will almost certainly resurface at the new trial; therefore, we consider it here.

The State contends that defendant gave implied consent to the blood test by operation of N.C. Gen. Stat. § 20-16.2 (Cum. Supp. 1981), the "implied consent" statute. The relevant text follows:

20-16.2(a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent . . . to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of alcoholic beverages. The test or tests shall be

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administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of alcoholic beverages. . . .

(b) Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this section and the test or tests may be administered. . . .

Though subsection (b) does not specifically refer to an arrest requirement, it does refer to the "consent provided by subsection (a)," which contains the language "if arrested." There is strong support, however, for the proposition that the Legislature's intended focus was upon an officer's having "reasonable grounds" to suspect commission of an "implied consent" offense. *See, e.g., State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973). Requiring the arrest of an unconscious driver would serve no sensible purpose. It has long been established that a blood sample is non-testimonial evidence and that *Miranda* warnings need not be given prior to such a seizure. *See State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968), *cert. denied*, 396 U.S. 934, 90 S.Ct. 275, 24 L.Ed. 2d 232 (1969). Additional rights granted by G.S. 20-16.2(a)(1), (3) and (4), that defendant has a right to refuse the test, a right to have a qualified person administer an additional blood test, and a right to call an attorney and select a witness within thirty minutes of the notification of his rights, could not be exercised by an unconscious defendant. This fact, plus the provision of subsection (b) that the test may be administered to an unconscious person, indicates that, in such a case, the formal requirements of subsection (a) are not meant to apply. Though not dispositive of legislative intent in 1981, it is interesting to note that 1983 amendments to this statute contain a rewritten subsection (b) that expressly dispenses with the formal requirements of subsection (a) in the case of an unconscious person. 1983 N.C. Sess. Laws, ch. 435.

Although G.S. 20-16.2 operates to imply consent by an unconscious driver to a blood alcohol test, an analysis of the law under the Fourth Amendment of the United States Constitution

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and Article I, § 20 of the North Carolina Constitution indicates that consent may not be necessary to seize a blood sample from an unconscious driver. Other jurisdictions have begun their analysis of this question by referring to *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966). In an opinion acknowledged as "somewhat formalistic" by the Ninth Circuit, *United States v. Harvey*, 701 F. 2d 800 (1983), the Supreme Court found the drawing of blood from an objecting suspect to be permissible under the Fourth Amendment. There was probable cause to believe the defendant was drunk and he was arrested before the blood was drawn. The "seizure" was permitted under the rationale that a search incident to an arrest may be made to uncover concealed weapons or prevent destruction of evidence under the direct control of the accused. Once such a search is permitted, it is "impractical and unnecessary" to confine the search to those objects alone. *United States v. Schmerber, supra*. The facts that probable cause existed to believe defendant had been driving under the influence of alcohol, that blood alcohol begins to diminish shortly after drinking stops, and that extraction of blood is a highly effective and virtually risk- and pain-free method of testing permitted the seizure of blood from defendant's person without a search warrant. Some jurisdictions stop at this point in the analysis and conclude that the lack of an arrest of an unconscious driver precludes a "search incident to an arrest" analysis. See, e.g., *People v. Superior Court of Kern County*, 493 P. 2d 1145 (Cal. 1972); *State v. Richerson*, 535 P. 2d 644, cert. denied, 535 P. 2d 657 (N.M. 1975); *Layland v. State*, 535 P. 2d 1043 (Alaska 1975), overruled on other grounds, *Anchorage v. Geber*, 592 P. 2d 1187 (1979); *State v. Towry*, 210 A. 2d 455 (Conn. Super. Ct. 1965).

Other jurisdictions have interpreted *Schmerber* to mean that no arrest is necessary if there exists probable cause to arrest and exigent circumstances, such as the body's dissipation of blood alcohol. See *State v. Mitchell*, 245 So. 2d 618 (Fla. 1971); *State v. McMaster*, 288 A. 2d 583 (N.J. App. Div. 1972); *DeVaney v. State*, 288 N.E. 2d 732 (Ind. 1972).

The better view continues the analysis in light of *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed. 2d 900 (1973). In *Cupp*, police took scrapings from under the fingernails of a man suspected of strangling his wife. The scrapings were taken after defendant began rubbing his hands together behind his back. At

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the time he objected to having the scrapings taken and he was not under arrest or in custody. He was not actually arrested until approximately one month later.

The seizure in *Cupp* was also permitted on a rationale similar to that of a search incident to an arrest, even though no arrest had been made. The lack of arrest did not invalidate the search itself, but limited its scope. Defendant was sufficiently apprised of suspicions against him that he was motivated to destroy the evidence, an emergency that justified the limited intrusion of taking fingernail scrapings. *Id.*

The facts in *Cupp* differ from those in the case at bar in two significant respects: (1) while Murphy was conscious and actively objected to the seizure, Hollingsworth was unconscious and unaware of the seizure or the possibility of charges against him; and (2) the drawing of blood is arguably more intrusive than the scraping of fingernails.

In a recent case decided by the Ninth Circuit Court of Appeals, blood samples had been taken from two defendants, one that was conscious and objected to the seizure, and one that was delirious at the time of seizure. *United States v. Harvey, supra.* The court refused to expand *Cupp* to the conscious defendant for two reasons: (1) because extraction of a blood sample is more intrusive than scraping a fingernail and (2) the Supreme Court in *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed. 2d 633 (1980) cited *Cupp* for the proposition that where the formal arrest "followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." *United States v. Harvey, supra.* The second reason seems to overlook the fact that Murphy was not arrested until a month after the search of his person. See *Cupp v. Murphy, supra.* The formality of arrest helps insure that the police will not arbitrarily invade an individual's privacy, it sharply delineates the moment at which probable cause is determined, and it triggers certain responsibilities of the arresting officer and certain rights of the accused, e.g., *Miranda* rights. *United States v. Harvey, supra.*

The above argument lost its force, however, when the delirious defendant was considered. "There is no compelling reason

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why a prior arrest is necessary when it is shown that the suspect could not appreciate the significance of such action." *Id.*

The Supreme Court enumerated three factors that justified the scraping of Murphy's fingernails:

- (1) the existence of probable cause to arrest;
- (2) the limited nature of the intrusion upon the person;
and
- (3) the destructibility of the evidence.

Cupp v. Murphy, supra.

In determining how these factors affect the present case, we consider the simplest factors first. We find that the extraction of blood, though not so limited as the scraping of fingernails, may still be fairly characterized as a "slight intrusion." See *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed. 2d 448 (1957). Also, the body's breakdown of alcohol in the blood creates the reasonable risk that the evidence of intoxication will quickly be destroyed. See *Schmerber v. California, supra.*

The most difficult consideration is the issue of whether Officer Tessnier had probable cause to arrest the defendant at the time the blood sample was taken. Involvement in an automobile accident cannot be said *per se* to provide probable cause sufficient to order a blood alcohol test, but defendant's involvement was due first to a miscalculation in judging the distance between his automobile and the Datsun, then to an inability to prevent his high-speed crossing of the median. These circumstances, known to Officer Tessnier before he ordered the blood drawn, indicated an impairment of coordination. Officer Tessnier also smelled the odor of alcohol from the crushed passenger side of defendant's Chevrolet. The two other passengers were not breathing; defendant was gasping for breath. Beer cans on the floor of the car were unopened and could not contribute to the odor. There was no testimony concerning any dampness or puddles that would indicate spilled beer. We hold under these facts that Officer Tessnier had probable cause to arrest defendant at the time the blood sample was drawn.

Therefore, the three criteria of the Cupp test are satisfied and we hold that the blood alcohol test performed on blood seized

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from defendant did not violate defendant's rights under the Fourth Amendment of the United States Constitution and Article I, § 20 of the North Carolina Constitution.

Jurisdictions following a similar line of reasoning are numerous. *See, e.g., Aliff v. State*, 627 S.W. 2d 166 (Tex. Cr. App. 1982) (defendant semi-conscious); *Ashley v. State*, 423 So. 2d 1311 (Miss. 1983) (defendant conscious); *People v. Todd*, 322 N.E. 2d 447 (Ill. 1975) (defendant unconscious); *People v. Sutherland*, 683 P. 2d 1192 (Colo. 1984) (defendant conscious).

New trial.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. MALVIN WHITE

No. 8410SC1165

(Filed 1 October 1985)

1. Searches and Seizures § 14— search of defendant's person at airport—consent voluntary

Defendant waived any right to object to a stop and freely and voluntarily consented to a search which yielded heroin and cocaine where two officers observed defendant deplane at Raleigh-Durham Airport and asked to see his ticket and driver's license, asked defendant if he would talk with them, suggested that they talk in a nearby office, and asked if defendant would consent to a search of his person, to all of which defendant agreed.

2. Criminal Law §§ 75.1, 84— seizure of defendant in airport—statements to officers admissible

In a prosecution for trafficking in heroin by possession and transportation and possession with intent to sell cocaine, statements made by defendant to police were not inadmissible on the ground that officers seized defendant in violation of the Fourth Amendment where the officers approached defendant in a public place, an airport, did not display any weapons or uniforms, requested but did not demand defendant's identification and ticket, and then immediately returned them. Nothing in the facts suggests defendant had any objective reason to believe that he was not free to end the conversation and continue on his way.

3. Criminal Law § 91— speedy trial dismissal denied—no error

Defendant's statutory speedy trial motions for dismissal of charges of trafficking in heroin by possession and transportation and possession with intent

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to sell cocaine were properly denied where 443 days elapsed between his indictment and trial, but 285 days elapsed from the date defendant filed a motion to suppress to the date it was heard, and court ordered continuances and corresponding exclusions left 105 unexcluded days. Although the trial judge did not make detailed findings of fact for each period of exclusion, the trial court did not err by excluding the 285 days where defendant requested several continuances during that period, changed counsel twice, apparently consented to a "mistrial" of a hearing on his motion, and spent additional time awaiting a transcript of the hearing. G.S. 15A-701 *et seq.*

4. Constitutional Law § 30; Bills of Discovery § 6— discovery of police reports denied—no error

In a prosecution for trafficking in heroin by possession and transportation and possession with intent to sell cocaine, the trial court did not err by denying defendant's motion for the police reports of the arresting officers.

5. Criminal Law § 7.5— requested instruction on duress—given only as to defendant and family—no error

In a prosecution for trafficking in heroin by possession and transportation and possession with intent to sell cocaine, the trial court did not err by confining its instruction on the defense of duress to threats against defendant and his family where the only evidence relied on by defendant to support the instruction was testimony that a grenade-wielding individual approached defendant in his place of business and told him that if he did not transport drugs "where the grenade lands would be [defendant's] responsibility," this evidence came after extensive testimony about threats against defendant's family, the court instructed the jury repeatedly that threats against defendant and his family could excuse the crime, and the court on several occasions referred to defendant's fear for "himself or another."

APPEAL by defendant from *Brewer, Judge*. Judgments entered 21 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 23 August 1985.

This is a criminal case involving trafficking in heroin by possession and transportation and possession with intent to sell cocaine. Following denial of his motions to suppress the State's evidence, defendant was found guilty. From judgments imposing concurrent sentences of 14 years, 14 years and 3 years, defendant appeals. The facts found by the court following the hearing on the motions to suppress are as follows:

Captain Brown of the Wake Sheriff's Department and SBI Agent Turbeville were observing passengers deplaning at Raleigh-Durham Airport. The plainclothes officers noticed defendant. He was alone, appeared to be looking around and was wearing a jacket and jeans. When the officers attempted to make eye con-

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tact with defendant, he looked at them and then placed a handkerchief to his face. The officers followed him. He asked the officers for directions on how to leave the terminal which they gave. The officers followed defendant. Though defendant carried no luggage and did not pick up any, he went to the luggage area.

The officers accosted defendant outside the terminal, identified themselves as police, and asked to see his ticket and driver's license. They checked them and returned them to defendant. The officers advised defendant that they were conducting a narcotics investigation and asked him if he would talk with them. He agreed to do so. The officers suggested that they talk in a nearby office, and defendant agreed to accompany them. Defendant testified that because "where he had been brought up, one did not refuse to go with two police officers," he felt he had no alternative but to comply, but the officers made no threats or promises to make him accompany them.

In the office, the officers again identified themselves as narcotics officers and requested defendant's cooperation. They asked if defendant would consent to a search of his person and defendant consented. The search yielded packages containing heroin and cocaine. Defendant was arrested immediately.

Attorney General Thornburg by Assistant Attorney General Grayson G. Kelley for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender David W. Dorey for defendant-appellant.

EAGLES, Judge.

I

[1] The principal issue before us involves the denial of defendant's motions to suppress. Because defendant did not except to any of the findings of fact recited above, they are binding on appeal. *State v. Colbert*, 65 N.C. App. 762, 310 S.E. 2d 145, *rev'd on other grounds*, 311 N.C. 283, 316 S.E. 2d 79 (1984). The findings of fact establish that defendant by his own consent waived any right to object to the stop and search. We base our conclusion on the opinion of the United States Supreme Court on strikingly similar facts in *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d

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497, 100 S.Ct. 1870, *reh'g denied*, 448 U.S. 908, 65 L.Ed. 2d 1138, 100 S.Ct. 3051 (1980).

II

We first address the motion to suppress the fruits of the search. In *Mendenhall*, as here, two narcotics agents observed defendant deplaning. They stopped her and asked to see her ticket and driver's license, which they returned to her. Unlike the instant case, the ticket was in a different name from the license. The agents then asked defendant to accompany them to their office nearby, and defendant did so. In the office, the agents asked to search defendant's person and bag, and she consented. The search resulted in discovery of heroin, and defendant was immediately arrested. The court found that no Fourth Amendment rights had been violated, since the record supported the trial court's determination that defendant "freely and voluntarily" consented to the search. The only difference of significance between the *Mendenhall* facts and the instant case was that the officers, in addition to requesting Mendenhall's cooperation, also told her she was free to refuse. While the Supreme Court considered this "highly relevant," *id.* at 558-59, 64 L.Ed. 2d at 512, 100 S.Ct. at 1879, it also reiterated its earlier holding that knowledge of a right to refuse is not *required* to prove effective consent. *Id.*, following *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973) (reversing a Court of Appeals decision requiring such proof). Whether effective consent was given to a search is a question to be determined by the court in light of all the circumstances. *Id.*; see *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642, 103 S.Ct. 503 (1982) (both following *Schneckloth*).

We note that issue of effective consent to search has been scrutinized by our Supreme Court in *State v. Fincher*, *supra*. There our Supreme Court upheld a consent to search given by a minor defendant who had been arrested and handcuffed, and was in the presence of at least ten police officers. Fincher suffered from substantial psychological, emotional and developmental disabilities and was told by officers that if he did not give his consent then, officers would obtain a warrant and "[e]ither way, we are going to search the apartment." When the totality of the cir-

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cumstances in the instant case is considered in light of the *Fincher* precedent, it is clear that the trial court did not err here in its conclusion that the defendant consented to the search.

Relying on *Mendenhall* and *Fincher*, we hold that on these facts the trial court could and did correctly conclude that defendant here freely and voluntarily consented to the search which yielded the incriminating drugs.

III

[2] Defendant next argues that the trial court improperly admitted statements made by him to police, on the ground that the officers "seized" him in violation of the Fourth Amendment and his statements were the "fruit of the poisonous tree." See *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963). We look again to *Mendenhall* for guidance. The *Mendenhall* court did not reach agreement on whether Mendenhall had been seized within the meaning of the Fourth Amendment at the time of the initial stop. The plurality opinion enunciated an objective test for such determinations: "... a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he or she was not free to leave." 446 U.S. at 554, 64 L.Ed. 2d at 509, 100 S.Ct. at 1877. Though the test was enunciated in a plurality opinion in *Mendenhall*, it is the law in North Carolina. *State v. Freeman*, 307 N.C. 357, 298 S.E. 2d 331 (1983); *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982).

Following *Mendenhall*, we again conclude that defendant's constitutional rights were not infringed. The officers approached defendant in a public place, did not display any weapons or uniforms, requested but did not demand defendant's identification and ticket and then immediately returned them. Compare *Mendenhall*, 446 U.S. at 555, 64 L.Ed. 2d at 510, 100 S.Ct. at 1877. Nothing in the facts before us suggests defendant had any *objective* reason to believe that he was not free to end the conversation and continue on his way. See *id.* This assignment is also overruled, as well as defendant's contention that the illegal seizure tainted his consent.

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IV

[3] Defendant was indicted 13 December 1982 (following arrest) and brought to trial 1 March 1984, a total of 443 days later. He made several motions seeking dismissal of the charge for violation of his statutory right to a speedy trial. We note that neither his motions at trial nor his argument here purport to assert a violation of his constitutional right to a speedy trial. The latest speedy trial motion came after the case was called for trial, but before the jury was impanelled. At that time defense counsel asked the court to reexamine its previous computations and also renewed the motion to dismiss, noting the passage of additional time since the most recent defense motion. From the court's summary denial of the motions, defendant assigns error.

The Speedy Trial Act, G.S. 15A-701 *et seq.*, established a new statutory right to trial within 120 days of the last act triggering the criminal process. G.S. 15A-701(a); *State v. Jones*, 70 N.C. App. 467, 320 S.E. 2d 26 (1984). It adopted in part provisions of federal speedy trial statutes. 18 U.S.C. Section 3161 *et seq.*; *State v. Rogers*, 49 N.C. App. 337, 271 S.E. 2d 535, *dis. rev. denied*, 301 N.C. 530, 273 S.E. 2d 464 (1980). Both the federal and the North Carolina statutes allow courts to exclude periods of time from computation of the statutory period. 18 U.S.C. Section 3161(h); G.S. 15A-701(b). Indeed, the exclusions appear almost to have swallowed up the rule.

Once a defendant shows that the 120-day period under the Act has been exceeded, the State must assume the burden of justifying periods it contends were properly excluded. *State v. Herbin*, 64 N.C. App. 711, 308 S.E. 2d 338 (1983). On appeal, however, the burden shifts: once the motion to dismiss has been denied, defendant-appellant assumes the twin burdens of assuring that the record is properly made up, *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983), and showing that error has occurred to his or her prejudice. G.S. 15A-1443(a). If the record is deficient or silent upon a particular point, we will presume that the trial judge acted correctly. *State v. Dew*, 240 N.C. 595, 83 S.E. 2d 482 (1954). We have examined the record here with these principles in mind.

The largest exclusion shown by the record consists of 285 days, being the period from 3 March 1983, when defendant through counsel filed his motion to suppress, to 13 December

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1983, when the motion was finally heard. Defendant attacks the exclusion as unreasonable, particularly by comparison with exclusions made in other cases.

Although our opinions have suggested that trial judges should make detailed findings of fact for each period of exclusion, *State v. Rogers, supra*, and the trial court's failure to do so here hinders effective appellate review, neither the Act nor our cases require detailed findings. Compare 18 U.S.C. Section 3161(h)(8)(A) (detailed findings apparently required). Time periods pending pre-trial motions are properly excludable under the Act. G.S. 15A-701 (b)(1)d. There is no time limit within which motions must be heard; the law merely requires hearing "within a reasonable time," *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981), allowing sufficient time for preparation by the parties. What is a "reasonable time" depends on the circumstances of the individual case.

Here defendant requested several continuances during the period of 3 March through 13 December, and changed counsel twice. Defendant apparently consented to a "mistrial" of a hearing on his motion in August, and additional time was spent awaiting a transcript of the hearing. Defendant has not directed us to any record evidence suggesting that these delays were caused by dilatory tactics of the State. On this record, then, although disapproving of the exclusion of such large blocks of time without detailed findings, we must hold that the trial court did not err in excluding the 285 days.

Under the circumstances detailed above, we do not find the 285-day period so unreasonable *per se* to require reversal. See *State v. Fearing*, 304 N.C. 499, 284 S.E. 2d 479 (1981) (271-day exclusion approved). Neither the Supreme Court, this Court, nor the legislature has established a maximum outer limit within which a case must be tried in order to comply with a defendant's statutory right to speedy trial. Defendant's argument is more properly addressed in a constitutional context. No constitutional speedy trial question was raised below and we will not consider it here. *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982).

Our ruling still leaves 158 days between indictment and trial. The record reflects further court-ordered continuances and corresponding exclusions from 16 December 1983 to 3 January 1984

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(18 days), from 9 January to 23 January 1984 (14 days), and from 23 January to 13 February 1984 (21 days). Subtracting these periods leaves 105 unexcluded days between 13 December 1982 and 1 March 1984. This amount of time falls within the limits established by the Act. We therefore hold that defendant's motions were properly denied.

V

[4] Defendant assigns error to the denial of his motion for disclosure of the police reports of Agents Brown and Turbeville. Our Supreme Court has recently rejected similar contentions. *State v. Alston*, *supra*. This assignment is without merit.

VI

[5] Defendant finally assigns error to the trial court's failure to instruct the jury as he requested on the defense of duress. Defendant argues that the court erroneously confined the defense of duress to threats against defendant and his family, leaving out threats to his business patrons. In order to prevail here, defendant must show that the requested instruction was not given in substance, and that substantial evidence supported the omitted instruction. *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *State v. Corn*, 307 N.C. 79, 296 S.E. 2d 261 (1982). The trial court need only give the jury instructions supported by a reasonable view of the evidence. *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973). The only evidence relied on by defendant to support the requested additional instruction was testimony that a grenade-wielding individual approached defendant in his place of business and told him that if he did not transport drugs "where the grenade lands would be [defendant's] responsibility." This came after extensive testimony about threats against defendant's family. The court instructed the jury repeatedly that threats against defendant and his family could excuse the crime, and on several occasions referred to defendant's fear for "himself or another." Viewing the charge as a whole in light of the evidence, as we must, *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976), we conclude that the omission was not so significant as to change the result. *State v. Sherian*, 234 N.C. 30, 65 S.E. 2d 331 (1951), relied on by defendant, is distinguishable in that there the court failed entirely to instruct the jury expressly on the defense of duress. Here, on the other hand, the court repeatedly and fully in-

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structed the jury on the elements of the defense, omitting only mention of threats to business patrons suggested by a single statement in a lengthy trial. On this record, we find no prejudicial error.

VII

We conclude that defendant received a fair trial, free of prejudicial error.

No error.

Judges JOHNSON and PARKER concur.

IN RE: ERICA RENEE WILLIAMSON

No. 8413DC630

(Filed 1 October 1985)

1. Infants § 6.2— child custody—modification of order—insufficient evidence and findings

An order transferring custody of a child was not supported by evidence and findings that circumstances had substantially changed since the original placement of the child where the child's father had murdered the mother and was serving a prison sentence of twenty-five years; the child's closest relatives were Melissa Clark, her mother's first cousin, and her paternal aunt Fredrickia Britt; the Clarks lived in Mecklenburg County and the Britts in Columbus County, where the murder occurred; the court had originally placed the child with the Clarks because the court concluded that it was in the best interest of the child not to be in the community where the killing occurred, because the Clarks were deemed capable of establishing and maintaining a cordial and stable relationship with the child and her half-sisters, and because the Clarks were deemed capable of dealing with problems that might arise if the father was released from custody and sought to establish some relationship with the child; the additional reviews cited by the court in its order changing custody were of matters that existed when the first determination was made; and the additional factors listed by the court either were not supported by competent evidence or concerned facts and conditions that existed when custody was awarded to the Clarks. The only change was in the court's evaluation of the circumstances and the only basis for returning the child to Columbus County in the custody of the Britts was the assumption that the child's father would assert his parental right to custody after parole and that placing the child with the Britts would probably result in a permanent placement with blood relatives. A change of custody must be based on conditions that exist at the

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time rather than upon conditions it is assumed will exist in the future; moreover, there is nothing miraculous about the blood of close relatives and being reared by them is not necessarily beneficial in the long or short term.

2. Guardian and Ward § 2— court order changing guardian of child—no showing of neglect or unfitness—invalid

An order changing the legal guardians of a child, along with custody, was not valid where there was no showing that the guardians had either neglected their duties or were unfit to continue serving in that capacity. G.S. 33-9.

APPEAL by respondents from *Gore, Judge*. Orders entered 16 December 1983, 24 January 1984 and 21 March 1984 in District Court, COLUMBUS County. Heard in the Court of Appeals 7 February 1985.

This appeal concerns the custody and guardianship of Erica Renee Williamson, now four years and seven months old. The petitioners are Fredrickia Britt, a sister of the child's father, and her husband, Charles Britt. The respondents are Melissa Clark, a first cousin of the child's mother, and her husband, Arthur Clark. The Britts live in Columbus County, the Clarks in Mecklenburg County.

On 4 May 1982, at the age of sixteen months, the child was adjudicated to be a dependent child pursuant to G.S. 7A-517(13) and a guardian *ad litem* was appointed to protect her legal and property rights. The adjudication was made because on 30 April 1982 her father, Charles Fred Williamson, had shot and killed her mother following a custody hearing in the Columbus County District Court. Williamson eventually pled guilty to second degree murder and is now serving a prison sentence of twenty-five years. Following the dependency hearing, Judge William E. Wood placed the child in the temporary custody of the Columbus County Department of Social Services and recommended that neither placement nor visitation with the Britts be considered because of the "possibility of future harm to the child by being in the home of the sister of the individual who killed her mother." Six days later the Britts filed a petition to adopt the child, which was consented to by the father, who was in jail awaiting trial. On 25 May 1982, another District Court judge received a home study report of several possible placements for the child, including the Britts. On 8 September 1982, an interlocutory order was entered allowing the adoption to proceed; but two days later Judge William C.

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Gore entered an order making Melissa and Arthur Clark of Mecklenburg County the guardians of the person of the child pursuant to the provisions of G.S. 7A-585 and nullifying the father's consent to the adoption. Judge Gore's preliminary findings of fact included the following: Erica has two minor half-sisters, children of her mother by a previous marriage; her closest adult relations are her paternal aunt, Fredrickia Britt, and her mother's first cousin, Melissa Brown Clark; both the Britts and the Clarks have suitable homes for Erica; both the Britts and the Clarks are "excellent prospective placements"; and her guardian *ad litem* recommends placement with the Clarks. After stating the foregoing findings, the judge "CONSIDERED THE FOLLOWING SPECIAL CONCERNS arising out of the extraordinary nature of these proceedings" and made further findings as follows:

a. The ability of the persons with whom placement is made to establish and nurture a cordial and stable relationship between the juvenile and her two half-sisters in an attempt to provide her with some continuity and stability later in her life, . . .

b. The ability . . . to deal with the problems which might arise in the event that Charles Fred Williamson is released from custody and seeks to establish some relationship with his child; and

c. The deleterious effect, if any, on the juvenile if she continued to reside in the same community wherein those tragic events . . . occurred, . . .

After such considerations, the COURT FINDS that Joseph Powell has expressed an inability and an unwillingness to associate with the Britts, and there could therefore be no continuing relationship between the juvenile and her half-sisters . . . The Court is further unconvinced that Charles Williamson would not prove an extreme disruption of the juvenile's stability if he were released and the child were in the custody of his sister. . . .

Based on its findings of fact and special concerns, the court concluded that it was in the "best interest" of the child to be placed with the Clarks and appointed them her legal guardians. The court also concluded that "the interlocutory order permitting the

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adoption to proceed was null and void insofar as these proceedings are concerned," since the child's father, who was in prison, "had neither legal nor physical custody" of Erica at the time he consented to her adoption by the Britts. The Britts appealed from this order and by a supplementary order the court denied the Britt's request for visitation privileges pending a disposition of the appeal, which was eventually dismissed on 6 March 1984 for lack of standing by the Britts. *In re Williamson*, 67 N.C. App. 184, 312 S.E. 2d 239 (1984).

On 20 June 1983 when the child's placement came on for mandatory review the court found that the child had adjusted well to being with the Clarks, and no reason existed for modifying the placement. The court also found that it was in the child's best interest for the Britts to visit her on occasion and that the Clarks and Britts had agreed to work out a satisfactory schedule among themselves. But the parties' attempts to work out a satisfactory visitation schedule were unproductive and by order entered on 18 August 1983 the court ordered four specific days of visitation in August, September, and October 1983. On 16 December 1983, without a hearing, the court found as a fact that the prior visitation order had been "satisfactorily carried out," concluded as a matter of law that it was in the "best interest" of the child to continue visitation with the Britts, and ordered a visitation for the next day, 17 December 1983. This visit was not made, however, because the Clarks had no notice of the order and the child was not there when Mrs. Britt showed up at their house in Charlotte demanding to see her. The Britts then filed a motion to show cause and a motion to give them custody of the child. An order to show cause was entered which the Clarks moved to dismiss because the custody issue was on appeal to this Court and no change of circumstances had been alleged.

Following a hearing held 20 January 1984, Judge Gore entered an order on 24 January 1984 changing the custody and guardianship of the child from the Clarks to the Britts. In doing so the court found that her initial placement with the Clarks was based largely on the court's special concerns, but that consideration of the following required that a change be made: Erica's knowledge that her father killed her mother; that the Clarks indicate an unwillingness to cooperate with the Britts' visitation; that her father will probably be paroled after serving approx-

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imately ten years of his prison term and upon his release will probably attempt to "reaffirm his parental rights"; that placement with the Britts would cause immediate short term considerable emotional trauma, "but would probably result in a PERMANENT PLACEMENT with BLOOD RELATIVES"; and that a permanent placement at the earliest possible age is of "paramount importance." From these purported findings, the court concluded that placement with the Britts was in Erica's best interest, appointed them as her guardians, and directed that custody be transferred in seven days. When custody was not transferred, the Britts filed another show cause motion, and in an order filed 21 March 1984 Judge Gore, after refusing to recuse himself, struck the 27 February 1984 show cause order since the record showed no legal basis to support it, shortened the notice for a new show cause hearing and directed Arthur Clark to present the child in court at that time. The Clarks, having appealed from the various orders entered, filed a motion in this Court to stay the proceedings below pending the resolution of this appeal and the motion was granted on 6 April 1984.

C. Franklin Stanley, Jr. for petitioner appellees Charles E. Britt and Fredrickia W. Britt.

Lee & Lee, by Junius B. Lee, III, Guardian ad litem for Erica Renee Williamson.

George Daly, George M. Anderson, McGougan, Wright & Worley, by D. F. McGougan, Jr., for respondent appellants Arthur Clark and Melissa Brown Clark.

PHILLIPS, Judge.

When this case was last here, *In re Williamson*, 67 N.C. App. 184, 312 S.E. 2d 239 (1984), it was intimated that the various orders issued by the court below *after* appeal was taken were without either authority or effect because of the "long standing general rule that an appeal removes a case from the jurisdiction of the trial court. . . ." *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E. 2d 748, 749 (1977). Whether this case is governed by the general rule—or by G.S. 7A-668, which authorizes the trial judge pending the appeal of a juvenile case "[f]or compelling reasons . . . [to] enter a temporary order affecting the custody or placement of the juvenile" when the best interest of the juvenile

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or the state so requires)—need not be determined, however, because we prefer to decide the other questions that the appeal raises on their merit, lest they be the subject of still more motions, hearings and orders in the court below, of which there has already been a surfeit.

[1] The main question that the appeal raises is whether the order transferring custody of the child from the Clarks to the Britts is supported by evidence and findings that circumstances had substantially changed since the child was placed with the Clarks. It is fundamental that before an order may be entered modifying a custody decree that there must be a finding of fact of changed conditions. This is because:

A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order.

Shepherd v. Shepherd, 273 N.C. 71, 75, 159 S.E. 2d 357, 361 (1968). No such finding was made here by the trial court and if such a finding had been made there is nothing in the record to support it. The court in its order merely stated that it had “conducted reviews” and “received additional evidence concerning matters and things which have occurred and transpired requiring the Court to reexamine the ‘Special Considerations’ [of the 10 September 1983 order] and also to consider additional factors. . . .” But the additional reviews conducted were of matters that existed when the first determination was made and the “additional factors” listed by the trial court either are not supported by competent evidence or concern facts or conditions that existed when custody was awarded to the Clarks, and have not changed since then. The only purported fact found by the court that did not exist in September 1983 when the child was placed with the Clarks was their inability or unwillingness to cooperate in the visitations of the Britts—a minor matter, in our view, that does not bear materially on the child’s welfare. Even so, the finding is unsupported by evidence. The court’s *ex parte* order filed 16 December 1983 directing further visitations found that the visitations already made had “been satisfactorily carried out” and the record indicates the court’s conditions in regard to those visits were

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fully met by both parties. That the visitation preemptorily ordered on 16 December 1983 for the next day was not carried out is irrelevant, as the court later recognized, since the Clarks had no notice of the court's order.

But the other circumstances that were deemed to support a change of custody had not changed since custody was given to the Clarks several months earlier; the only change was in the court's evaluation of them. At both times the Britts were close blood relatives of the child and lived in Columbus County where it is generally known that the child's father murdered her mother. At both times the child's father, Mrs. Britt's brother, was in prison and the likelihood of him being a disruptive influence upon his eventual release from prison if she is then living with the Britts was the same. At both times it was important for the child to maintain contact with her two half-sisters, who would not visit her if she was living with the Britts, but do visit her at the Clarks. And both times it was of paramount importance that the child have a permanent, stable, tension free home environment. When these matters were first considered the court soundly and necessarily concluded, it seems to us, that the best interests of the child required that she not be placed "in the same community wherein those tragic events . . . occurred," and the Clarks were made both custodians and legal guardians of the child because they were deemed capable of establishing and maintaining "a cordial and stable relationship" with the child and her half-sisters and of dealing "with the problems which might arise in the event Charles Fred Williamson is released from custody and seeks to establish some relationship with his child." Yet when these same concerns or circumstances were reconsidered a few months later, even though the child had "received excellent care" at the hands of the Clarks during the interim, as the court found and all the evidence shows, and even though it was recognized that taking the child from the Clarks "would cause considerable emotional trauma to the child for the immediate short term," the court concluded that it would be in the "permanent best interest of the child" to return her to Columbus County in the custody of the Britts. The only bases stated for this step, and the record suggests no others, are the court's assumptions that some years from now after he is paroled from prison the child's father will assert his parental right to custody, and that placing the child with the

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Britts "would probably result in a *permanent placement with blood relatives*." (Emphasis by the trial court.) Manifestly, these conditions do not now exist and are therefore no basis whatever for the order entered, since a change of custody must be based upon conditions that exist at the time, rather than upon conditions that it is assumed will exist at some future time. *Stanback v. Stanback*, 266 N.C. 72, 145 S.E. 2d 332 (1965).

But even apart from their anticipatory nature the purported findings do not support the court's conclusion that changing custody to the Britts would be in the child's best interests. Circumstances determine custody cases as all others. There is nothing miraculous about the blood of close relatives and being reared by them is not necessarily beneficial to children either in the long or short run; and though cultivating family ties and tradition is usually wise and a stabilizing blessing to children, under some circumstances it could be an overwhelming burden that it would be folly to incur. In the context of the circumstances of this case, there is simply no basis at all for concluding that this child's best interests would be served by requiring her to live with people who will be a daily reminder of her mother's murder. Furthermore, the child's family heritage is not limited to the paternal line; she has other family ties and traditions, which are free of any burdensome taint, that are being strengthened under the order first entered.

[2] The other important question raised by this appeal is whether the order removing the Clarks as legal guardians of the child's person and appointing the Britts in their stead is also invalid. It is invalid, though not for precisely the same reason as the custody order. A legal guardian of a child's person, unlike a mere custodian, is not removable for a mere change of circumstances. Unfitness or neglect of duty must be shown. G.S. 33-9. Our rule is in accord with the general American rule on this point. *See*, 39 Am. Jur. 2d *Guardian and Ward* Secs. 57, 58 (1968). A guardian "may not be removed at the mere caprice of the court or the complaining party." 39 C.J.S. *Guardian and Ward* Sec. 42, p. 84 (1976). Since there was no showing, and the court did not find, that the guardians had either neglected their guardianship duties or were unfit to continue serving in that capacity, the order of removal cannot stand.

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Thus, we vacate the order entered on 24 January 1984 and also the orders entered to implement it on 16 March 1984 and 21 March 1984. The *ex parte* order entered 16 December 1983 regarding visitations, which is now moot, is also vacated.

Vacated.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. A'DOLPHUS MARCEL MARTIN

No. 8430SC1182

(Filed 1 October 1985)

1. Criminal Law §§ 23.4, 91.1— rejection of plea bargain—failure to grant continuance or give opportunity to modify—no error

There was no error in a prosecution for possession of cocaine with intent to sell and sale and delivery of cocaine where the trial court rejected defendant's plea arrangement without granting a continuance or giving defendant an opportunity to modify the arrangement. Defendant failed to move for a continuance and the trial court rejected the plea because it was not free and voluntary, so that an opportunity to modify the agreement would not have resolved the problem and made the plea acceptable. G.S. 15A-1023(b).

2. Criminal Law § 7; Narcotics § 4.2— possession of cocaine with intent to sell—evidence of entrapment insufficient

There was insufficient evidence to require submission of the defense of entrapment to the jury where defendant's evidence failed to show acts of persuasion, trickery, or fraud used by the S.B.I. agent to induce defendant to obtain cocaine; defendant had his own contact from whom he obtained cocaine and was not led to a dealer by the S.B.I. agent; and defendant presented no evidence that the agent made efforts to ingratiate himself with defendant, offered gifts, or made promises. That the agent gave defendant money and asked him to obtain cocaine was not evidence of inducement, just an opportunity to commit the offense.

APPEAL by defendant from *Burroughs, Judge*. Judgments entered 29 March 1984, in Superior Court, MACON County. Heard in the Court of Appeals 26 August 1985.

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Attorney General Lacy H. Thornburg by Assistant Attorney General Marilyn R. Rich for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Robin E. Hudson for defendant appellant.

COZORT, Judge.

Defendant was charged in indictments proper in form with four counts of possession of cocaine with intent to sell and three counts of sale and delivery of cocaine. He was found guilty of all charges and received consecutive sentences of three and ten years. On appeal, defendant contends it was error for his case to be tried by the same trial judge who rejected a plea agreement because the judge did not believe the plea was voluntarily made by defendant. Although he did not move for a continuance at that time, defendant argues that the trial court should have continued the case on its own motion. Defendant also contends the trial court erred by failing to submit to the jury the issue of entrapment. We find no error. The relevant procedures and facts follow.

Prior to trial, counsel for defendant and the assistant district attorney announced to the court that they had reached a plea agreement whereby defendant would plead guilty to four counts of sale and delivery, the remaining charges would be dismissed, and defendant would receive a five-year sentence. The trial judge questioned defendant, as required under G.S. 15A-1022, to determine the voluntariness of his plea, and rejected the plea bargain. Defendant did not move for a continuance.

At trial the State presented evidence which tended to show the following: Rick Whisenhunt, special agent for the State Bureau of Investigation, testified that on 26 May 1983 he met defendant at the Sky City parking lot in Franklin. Whisenhunt told defendant that he was interested in buying an eighth of an ounce of cocaine. Defendant said that he did not have any cocaine with him, but he could go to Mountain City, Georgia, to get some and bring it back. Defendant took \$360.00 in advance payment and told Whisenhunt that he would meet him with the cocaine at 11:45 a.m. in the Macon Plaza Shopping Center. At 11:45 Whisenhunt picked up defendant at the shopping center and defendant told him that he would be extremely pleased with the cocaine. Defendant "snorted" a line of cocaine, resealed the baggie and gave it to

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Whisenhunt. Defendant said that he had been dealing drugs for sixteen years and had a reputation in the community as a "fair dealer who gave a good product at a fair price." Defendant also told Whisenhunt that he liked him and looked forward to dealing drugs with him in the future. At 5:30 p.m. Whisenhunt called defendant and went over to his house to discuss buying a quarter ounce of cocaine. Whisenhunt paid defendant \$570.00 and defendant later gave him the cocaine. On 3 June 1983 defendant sold Whisenhunt another quarter ounce of cocaine. On 14 June 1983 Whisenhunt and S.B.I. Agent D. C. Ramsey met defendant and discussed buying a half ounce of cocaine. Defendant wanted the money in advance and Whisenhunt and Ramsey refused to pay. On 6 October 1983 defendant told Whisenhunt he could get him a half ounce of cocaine for \$1,200.00, but he would need the money in advance. They agreed to meet at 7:00 p.m. at a motel. S.B.I. Agent Tom Frye and Whisenhunt met defendant that evening, defendant produced the cocaine, and the S.B.I. agents arrested defendant.

Defendant testified that when Whisenhunt first contacted him he said that he did not sell cocaine, but he knew someone who could help him. In May Whisenhunt went to defendant's house and defendant told him again that he did not have any cocaine, but he "would see what [he] could do for him." They met on 26 May 1983 at a bowling alley and defendant sold Whisenhunt and Graham Winstead cocaine. Defendant said that he did not make any profit, but he did it because he believed in helping people. In June and August 1983 defendant sold more cocaine to Whisenhunt. Defendant said that he knew it was wrong to sell cocaine, but he did it as a favor to Whisenhunt.

Defendant admitted that he had prior convictions for felonious possession of marijuana, possession with intent to sell marijuana, misdemeanor larceny, and traffic violations.

Defendant was found guilty of all charges and was sentenced to consecutive sentences of three and ten years.

[1] In his first assignment of error defendant argues that he is entitled to a new trial because the trial judge rejected his plea arrangement and failed to give him an opportunity to modify the arrangement or grant a continuance.

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G.S. 15A-1023(b) provides, in pertinent part:

If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court.

Before the trial, the trial judge was informed that the parties had reached a plea arrangement. The trial judge questioned defendant, as required under G.S. 15A-1022 to determine the voluntariness of the plea. The following exchange occurred:

Q. [The Court]: Do you now plead guilty?

A. [Defendant]: Yes sir.

Q. Are you in fact guilty?

A. No, sir.

Q. You are not guilty?

A. Not in fact.

Q. You're not guilty? Well, I'd better reject the plea bargain then.

At this point counsel for defendant spoke to defendant, and defendant said that he wanted to change his answer.

Q. [The Court]: Do you now personally plead guilty?

A. Yes, sir.

Q. And you are in fact guilty?

A. Yes, sir.

. . . .

Q. Other than the plea arrangement between you and the prosecutor, has anyone made any promises or threatened you in any way to cause you to enter this plea?

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A. If it please the Court, your Honor, not as of now, but before this case came to court I was made promises of my cooperation with the County in certain areas and categories that things would be enlightened for me.

THE COURT: All right, the plea is rejected.

The trial judge later said that he had rejected the plea because he did not believe it was free and voluntary due to defendant's responses as to whether he was guilty and whether he had been made any promises.

Defendant contends that the trial judge erred because he failed to give the parties an opportunity to modify the agreement as required in G.S. 15A-1023(b). An opportunity to modify the agreement could have allowed the parties to change the sentence agreed upon, and would have been helpful had the trial judge rejected the plea arrangement because he did not believe the sentence was appropriate. In this case, however, where the trial judge rejected the plea because it was not free and voluntary, an opportunity to modify the agreement would not have resolved the problem and made the plea acceptable.

Defendant further contends that the trial judge erred by failing to order a continuance on its own motion after the plea was rejected. Defendant relies on *State v. Tyndall*, 55 N.C. App. 57, 284 S.E. 2d 575 (1981), to support his argument. In *Tyndall*, the defendant moved for a continuance after the trial judge rejected the plea arrangement. The judge denied the motion, and this Court ordered a new trial, holding that it was error to deny the motion for a continuance because G.S. 15A-1023(b) entitled the defendant to a continuance after the rejection of the plea arrangement. *Tyndall*, however, does not interpret G.S. 15A-1023(b) as requiring the court to order a continuance on its own motion. In the instant case defendant failed to move for a continuance, and the trial court was not required under G.S. 15A-1023 to order a continuance on its own motion. This assignment of error is overruled.

[2] In his second assignment of error defendant argues that the trial court erred by refusing to submit the issue of entrapment to the jury.

It is the duty of the trial judge to instruct the jury on all substantive features of the case raised by the evidence. *State v.*

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Brock, 305 N.C. 532, 290 S.E. 2d 566 (1982). Before the trial court can submit the defense of entrapment to the jury there must be some credible evidence tending to support defendant's contention that he was a victim of entrapment. *State v. Walker*, 295 N.C. 510, 246 S.E. 2d 748 (1978). The defense of entrapment consists of two essential elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime; and (2) that the criminal design originated in the minds of the law enforcement officers rather than the innocent defendant, such that the crime was the product of the creative activity of the law enforcement officers. *Id.*; *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975).

Several recent cases from this Court illustrate what has been held to constitute sufficient evidence of entrapment to submit the defense to the jury. In *State v. Blackwell*, 67 N.C. App. 432, 313 S.E. 2d 797 (1984), the defendant presented evidence which tended to show that he had been unemployed for awhile and occasionally washed cars to make some money. The undercover agent approached the defendant and told him that he was thinking about opening a pool hall and offered him a job as a manager. The agent met the defendant many times before the drug transaction and talked about the job and gave the defendant small amounts of money. Upon the agent's request, the defendant sold him drugs at least twice. This Court held that an instruction on entrapment should have been submitted to the jury because the evidence, viewed in the light most favorable to defendant, tended to show that the undercover agent induced defendant to sell him the drugs by his gifts and promises of a job. In *State v. Jamerson*, 64 N.C. App. 301, 307 S.E. 2d 436 (1983), the defendant's evidence tended to show that two undercover agents approached him and asked him for drugs. The defendant, who was a college student, told them that he had no drugs. One agent told the defendant that they would be back that night, and he should get them some cocaine. Later that night the agents returned to defendant's apartment and one of them begged him to get cocaine. Defendant repeated that he did not have any. Finally, one agent told the defendant that he knew of another student on campus who could sell them some cocaine. The agent drove the defendant to the other student's dormitory and gave him the money to buy the cocaine. This Court held that viewed in the light most favorable to

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the defendant, there was sufficient evidence to require a jury instruction on the entrapment defense and ordered a new trial. In *State v. Grier*, 51 N.C. App. 209, 275 S.E. 2d 560 (1981), the defendant, who was unemployed, testified that the undercover agent visited her home frequently, brought her food, beer and cigarettes, and gave her money to fix her car and repair her leaky basement. The agent also drove the defendant to make each of the drug purchases. This Court held that the agent ingratiated himself with the defendant in order to induce her to purchase drugs for him, and the trial court had properly submitted the issue of entrapment to the jury.

As these cases show, defendant must present evidence that Whisenhunt did something more than simply meet defendant and give him money to buy the cocaine. Defendant's evidence, viewed in the light most favorable to him, fails to show acts of persuasion, trickery, or fraud used by Agent Whisenhunt to induce defendant to obtain the cocaine. According to defendant, the first time he was contacted about buying cocaine he said: "I told [Graham Winstead] again that I didn't have any cocaine, you know, but I have come into contact with people, naturally, that do and that if he wanted some, I would see what I could do for him." Defendant later met Winstead and Whisenhunt; they drank a few beers, shot pool, and discussed cocaine. Whisenhunt gave defendant money for the cocaine. Defendant had his own contact in Georgia from whom he obtained the cocaine. He was not led to a dealer by Whisenhunt. Defendant has not presented any evidence that Whisenhunt made efforts to ingratiate himself with defendant, offered gifts, or made promises; rather, defendant's own evidence shows that he was very willing to sell Whisenhunt the cocaine. That Whisenhunt gave defendant the money and asked him to obtain the cocaine is not evidence of inducement, just an opportunity to commit the offense. See *State v. Booker*, 33 N.C. App. 223, 234 S.E. 2d 417 (1977). We find that defendant has failed to offer sufficient evidence of entrapment to require submission of the defense to the jury.

We have carefully reviewed defendant's assignments of error and find

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No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL DAVIS

No. 848SC1126

(Filed 1 October 1985)

1. Criminal Law § 5.1; Homicide § 28.7— defense of temporary insanity—insufficient evidence

The trial court did not err in refusing to instruct the jury on the defense of temporary insanity where defendant's only evidence of alleged insanity was his testimony that, upon finding his wife in a motel room with two men, he "lost his mind," "went blind or something," "went pure bizarre," "was all to pieces," and "went completely out of his mind." Rather, such testimony tends to show that defendant acted in the heat of passion.

2. Criminal Law § 71— instantaneous conclusion of the mind

Testimony by a witness, when asked where she saw defendant go upon his arrival at a motel, that "I would say what looks like room fifty-one" was competent as an instantaneous conclusion of the mind.

3. Criminal Law § 71— testimony based on knowledge and perceptions—shorthand statement of fact

A witness's testimony that the victim "looked just like his ribs were stomped in" and that the victim "won't very strong" was admissible based on the witness's knowledge of the victim and her perceptions, and her characterization of the victim's appearance was admissible as a shorthand statement of fact.

4. Homicide § 15.5— expert testimony—cause of injuries

A pathologist was properly permitted to state his opinion that the blunt force injuries he noted in performing an autopsy on the victim "could have been caused by a foot or boot" and that more force was involved in causing the victim's injuries than simply bumping into things or falling down.

5. Criminal Law § 87— repetitious questions—clarification of testimony

The trial court did not err in permitting the State to ask a witness repetitious questions as to how many times defendant kicked the victim where it appeared that on several occasions the questions were posed to clarify the witness's testimony and the witness was reluctant to testify.

6. Criminal Law § 88.1— leading questions on cross-examination

The trial court did not abuse its discretion in permitting the State to ask a police officer leading questions on cross-examination concerning his observa-

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tions of the appearance and emotions of a witness at the time he gave a prior inconsistent statement.

APPEAL by defendant from *Barefoot, Judge*. Judgments entered 14 June 1984 in Superior Court, WAYNE County. Heard in the Court of Appeals 21 August 1985.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Barnes, Braswell & Haithcock by R. Gene Braswell and S. Reed Warren for defendant appellant.

COZORT, Judge.

Defendant was indicted for second-degree murder and felonious breaking and entering after forcibly entering a hotel room and discovering his wife with two other men. One of the men, Billy Williford, died after being assaulted repeatedly by the defendant. Defendant was convicted by a jury of voluntary manslaughter and nonfelonious breaking and entering. On appeal, defendant contends the trial court erred by refusing to instruct the jury on the defense of temporary insanity and in its rulings on various evidentiary questions. For reasons stated below, we find no prejudicial error.

The State's evidence tended to show the following:

On the afternoon of 4 September 1983, defendant's wife checked into the Wayne Motel with Williford and Melvin Bridgers. Defendant and his son came to the motel, broke down the door to the room occupied by the three, and forcibly entered the room. Williford was standing near the bed wearing only his shorts, having just finished taking a bath; defendant's wife was lying on the bed; and Bridgers was about ten feet inside the door. Defendant struck Bridgers on the eye, causing it to bleed. He then repeatedly hit and kicked Williford in the face and ribs. After about 20 minutes, everyone except Williford left the room. Williford was left lying on the floor. According to Bridgers, Williford looked like he was dead. He died from injuries to the head and brain caused by blows to the skull by a blunt object.

The defendant testified that he "just lost [his] mind" when he saw his wife on the bed and Williford standing there "with no

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clothes on." He slapped Williford a few times and "may have" kicked him. He testified he never intended to kill Williford and did not believe he did because Williford was all right when he left.

[1] Defendant's principal assignment of error is the trial court's refusal to instruct the jury on the defense of not guilty by reason of temporary insanity. The defendant contends he was entitled to an instruction on temporary insanity because the defendant's evidence showed he was unable to distinguish between right and wrong when he found his wife in the motel room, which affected his ability to form a specific intent to commit the crime of voluntary manslaughter, thus requiring an instruction on temporary insanity. Upon review of all the evidence in the case, the trial court's charge to the jury and the defendant's proposed charge on temporary insanity, we find the defendant was not entitled to an instruction on temporary insanity.

The request for instruction submitted by defendant read, in pertinent part, as follows:

I instruct you that if you find that at the time that the Defendant, William Earl Davis, found his wife in Room 51 of the Wayne Motel with Billy Williford, who was undressed except for his undershorts, and Melvin Bridgers, another male, and that at that time William Earl Davis temporarily lost his sanity in that he did not recognize or know right from wrong at the time that he engaged in a fight or beating of Billy Williford, which resulted in the death of Billy Williford, then in that event I direct that you return a verdict of Not Guilty.

The trial court submitted to the jury three possible verdicts: guilty of voluntary manslaughter, guilty of involuntary manslaughter, and not guilty. Its instructions to the jury were, in pertinent part, as follows:

Now I charge that for you to find the Defendant guilty of voluntary manslaughter, the State must prove two things beyond a reasonable doubt. First, that the Defendant intentionally beat Billy Williford with his hands, fists, and feet and second, this beating was a proximate cause of Billy Williford's death. . . . If you do not find the Defendant guilty of voluntary manslaughter, you must consider whether he is

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guilty of involuntary manslaughter. Involuntary manslaughter is the unintentional killing of a human being by an unlawful act, not amounting to a felony, or by an act done in a criminally negligent way. For you to find the defendant guilty of involuntary manslaughter, the State must prove two things to you beyond a reasonable doubt: first, that the defendant acted in a criminally negligent way. Now criminal negligence is more than mere carelessness. The defendant's act was criminally negligent if judging by reasonable foresight it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others. Second, the State must prove this criminally negligent act a [sic] proximately caused Billy Williford's death. . . . The burden of proving accident is not on the defendant. His assertion of accident is merely a denial that he has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt so I charge that if you find from the evidence beyond a reasonable doubt that on September 4, 1983, William Earl Davis intentionally beat Billy Williford with his hands, fists, and feet and thereby proximately caused Billy Williford's death, it will be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find, or if you have a reasonable doubt as to one or more of these things, then you would not return a verdict of guilty of voluntary manslaughter and if you do not return a verdict of guilty [of] voluntary manslaughter, then you must determine whether he is guilty of involuntary manslaughter. If you find from the evidence beyond a reasonable doubt that on or about September 4, 1983, William Earl Davis beat Billy Williford with his hands, fist, and feet and that this was done in a criminally negligent way thereby proximately causing Billy Williford's death, it would be your duty to return a verdict of guilty of involuntary manslaughter. However, if you do not so find, or if you have a reasonable doubt as to one or more of these things then it would be your duty to return a verdict of not guilty.

The defendant filed no notice on the defense of insanity in accordance with G.S. 15A-959. He offered no expert testimony on his mental condition or mental history. Defendant's only conceivable evidence on the issue of insanity was his testimony on

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numerous occasions that he "lost [his] mind," "went blind or something," "went pure bizarre," "was so mixed up right then," "was all to pieces," and "went completely out of [his] mind."

This testimony fails to show any evidence of insanity, either permanent or temporary. What it shows is the killing was done in the "heat of passion," which is killing "without premeditation but under the influence of sudden "passion," this term means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection.' [Citations omitted.]" *State v. Jones*, 299 N.C. 103, 109, 261 S.E. 2d 1, 6 (1980). A homicide may be mitigated from murder to manslaughter when there are circumstances that cause an accused to kill another out of a heat of passion. *Id.* That is precisely what happened in this case. The defendant was indicted for second-degree murder. The trial court correctly granted defendant's motion to send the case to the jury as a manslaughter case, not second-degree murder. The trial court then correctly instructed the jury on both voluntary and involuntary manslaughter. There was no evidence of insanity, and it is not error to refuse to instruct on insanity when there is no evidence of such. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977). This assignment of error is without merit.

The remainder of defendant's assignments of error challenge the trial court's rulings on evidentiary questions occurring during the trial. Upon examination of the record, we find no prejudicial error.

[2] We first consider defendant's exception to statements of Joannie Soloman, the sister of the motel manager and a temporary resident of the motel. When asked by the State where she saw the defendant go upon his arrival at the motel, she answered, "I would say what looks like room fifty-one." Defendant contends her answer was based on speculation. The witness, as a resident of Room 41, had earlier testified she knew where Room 51 was in reference to her own room. Based on her observations, her response was properly admitted as a "natural and instinctive inference" or "'instantaneous conclusions . . . derived from observation of a variety of facts presented to the senses at one and the same time.'" *State v. Joyner*, 301 N.C. 18, 23, 269 S.E. 2d 125, 129 (1980), quoting *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568

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(1911). Similarly, Miss Soloman's response, when asked whether defendant entered Room 51 was: "I presume because I heard—" and "[s]aw him sh - shut the door or whatever." These statements, while reflecting either poor memory or indistinct perception, are nonetheless competent and admissible because they were rationally based on the firsthand observation of the witness, rather than mere speculation or conjecture. *Id.* at 24, 269 S.E. 2d at 129.

[3] Defendant also excepts to Irene Sheehan's testimony that the victim "looked just like his ribs were stomped in," and her testimony that "[Williford] won't very strong." Sheehan had known the victim all his life and discovered the body in the motel room. Both statements were admissible based on her own knowledge of the victim and her perceptions, and her characterization of the victim's appearance was, at worst, a mere shorthand statement of the facts. *See* 1 Brandis on North Carolina Evidence Sec. 125 (1982). In addition, the witness's description was corroborated by the earlier testimony of the eyewitness Bridgers, and was consistent with later expert medical testimony.

For similar reasons, we find no prejudicial error in the admissibility of the statement by the investigating police officer that the motel room door "appeared like it had been kicked in." The officer's own subsequent testimony as well as that of other witnesses was sufficiently corroborative.

[4] Defendant's next assignments of error concern the admissibility of certain opinion evidence of the State's expert medical witness, Dr. John D. Butts. Dr. Butts testified that in his professional opinion, the "blunt forced injuries" he noted in performance of an autopsy of the victim Williford "could have been caused by a foot or boot." He further testified that in his opinion "more force [was] involved" in causing the victim's injuries than "just simply bumping into things or simply falling down." Defendant contends this testimony was based purely on speculation and had no probative value.

Dr. Butts testified as an expert in the field of forensic pathology. As a staff physician in the office of the Chief Medical Examiner for the State, Dr. Butts was qualified to render the above opinions. His detailed descriptions of the internal and external injuries to Williford, ranging from a torn liver, fractured ribs, and subdural hematoma to "several long . . . bruises . . .

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above the hip" in a "V-shaped pattern," are entirely consistent with the opinions he gave. The trial court is afforded a wide latitude of discretion when making a determination about the admissibility of expert testimony. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Expert testimony is admissible when it can assist the jury to draw certain inferences from facts because the expert is better qualified. *Id.*

[5] Defendant's next assignment of error concerns a series of questions posed by the State to Melvin Bridgers on direct examination. On at least six occasions, the State asked Bridgers how many times the defendant kicked Williford. Defendant contends on appeal that the trial court's allowing this repetitious questioning, over defendant's objections, was prejudicial error. It is the responsibility of the trial court to control the conduct and course of trial, and its discretion will not be disturbed unless manifestly abused. *State v. Covington*, 290 N.C. 313, 334-35, 226 S.E. 2d 629, 644 (1976). Upon reviewing the entirety of Bridgers' testimony, we note that on more than one occasion the question appeared to be posed for purposes of clarification. In addition, there is evidence in the record that Bridgers was reluctant to testify; that his perceptions may have been clouded by his state of intoxication and his wounded eye at the time of the crime; and that a statement given by Bridgers to police was inconsistent with his later testimony at trial. We find no abuse of discretion in the trial court's allowing repetitious questioning which clarified the witness's testimony.

[6] We next consider defendant's assignments of error concerning the State's cross-examination of Goldsboro Police Sergeant Perry L. Sharpe. The defendant called Sergeant Sharpe to testify about a prior inconsistent statement given by Bridgers. On cross-examination, Sergeant Sharpe was asked several questions pertaining to his observations of Bridgers' condition at the time he gave the prior statement: whether Melvin Bridgers "was in pain from his eye," whether he "look[ed] like he needed a drink," whether he appeared "distracted from the import or the meaning of [Sharpe's] questions," and whether Sergeant Sharpe's difficulty in finding him was a result of Bridgers' "fear of the courtroom."

In North Carolina, counsel is given wide latitude in the conduct of cross-examination. This is especially applicable in the for-

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mulation of leading questions by a cross-examiner. Such matters lie in the discretion of the trial court and in the absence of abuse of discretion, the exercise of such discretion will not be disturbed on appeal. *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982). Defendant has failed to demonstrate abuse of discretion or prejudice, as the responses given by Sergeant Sharpe were within his personal knowledge from his observations of Bridgers, and appearance and emotions of another are proper subject matter for opinion testimony by non-experts. *State v. Moore*, 276 N.C. 142, 146, 171 S.E. 2d 453, 455-56 (1970). Moreover, Bridgers admitted on the stand he had been drinking at the time of the offense and had a drinking problem, that his eye was bleeding, and that after the events occurred he was "scared" and he delayed reporting what happened. There was no error in the trial court's rulings during Sergeant Sharpe's cross-examination.

We have examined the remainder of defendant's assignments of error and we find them to be without merit. Having reviewed all assignments of error by the defendant, we find

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND GUIGNARD FREIGHT LINES, INC., APPELLEES v. TAR HEEL INDUSTRIES, INC., COMPLAINANT-APPELLANT AND RUFUS L. EDMISTEN, ATTORNEY GENERAL, INTERVENOR

No. 8410UC1360

(Filed 1 October 1985)

Carriers § 5.1— common carrier—contract tariff improperly approved

The Utilities Commission erred by approving a common carrier's proposed tariff for the shipment of textiles corresponding to a contract with Dupont where it was clear that the parties envisioned a long-range contractual relationship and the tariff filed with the Commission did not mention the carrier's willingness to dedicate equipment and personnel to the exclusive use of other individual shippers as it did with Dupont, and there was no evidence indicating that the carrier was willing to lease special equipment to serve individualized needs of other shippers or to train its employees to operate unique equipment

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belonging to other shippers and to make managerial decisions regarding the time and contents of the shipments, as it did with Dupont. The individually negotiated terms of the Dupont contract were not compatible with public service as a common carrier. G.S. 62-3(7), (8), G.S. 62-262(a).

APPEAL by complainant, Tar Heel Industries, Inc., from order of the North Carolina Utilities Commission entered 18 September 1984. Heard in the Court of Appeals 22 August 1985.

On 10 February 1984 Guignard Freight Lines, Inc. (Guignard), a common carrier as defined by N.C. Gen. Stat. 62-3(6), filed with the Utilities Commission a new local freight tariff pursuant to N.C. Gen. Stat. 62-134. The tariff established rates below those previously filed with the Commission for the shipment of textiles between Cape Fear, Maco and Wilmington, North Carolina. The new rates corresponded to the terms of a service contract awarded Guignard by E. I. Dupont de Nemours & Co., Inc. (Dupont), under which Guignard is to transport textiles produced at Dupont's Cape Fear manufacturing plant to nearby Maco and Wilmington warehouses. Previously Tar Heel Industries, Inc. (Tar Heel), a contract carrier by motor vehicle as defined by N.C. Gen. Stat. 62-3(8), had serviced the Dupont shuttle operation.

On 24 February 1984 Tar Heel filed with the Commission a complaint alleging that the Dupont shuttle operation constitutes contract carriage which Guignard, a common carrier, lacks authority to perform, and that the rates proposed in the tariff are below the cost of service and therefore constitute unreasonable preferences to a single shipper and "a destructive competitive practice as contemplated by G.S. 62-259." On 18 September 1984 the Commission approved Guignard's proposed tariff and denied Tar Heel's complaint.

Tar Heel appeals.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by J. Ruffin Bailey, Ralph McDonald, and Carolin Bakewell, for Tar Heel Industries, Inc., complainant appellant.

Temple & Grimes, by G. Henry Temple, Jr., for Guignard Freight Lines, Inc., respondent appellee.

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WHICHARD, Judge.

Review of a Utilities Commission decision is governed by N.C. Gen. Stat. 62-94. The decision is "prima facie just and reasonable." N.C. Gen. Stat. 62-94(e). The reviewing court may reverse or modify only if

substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commission, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. 62-94(b); see *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 19-20, 273 S.E. 2d 232, 235 (1981).

The facts here are not disputed. Whether under the undisputed facts Guignard is operating as a common carrier is a question of law for the court. *Jackson v. Stancil*, 253 N.C. 291, 301, 116 S.E. 2d 817, 824 (1960). Tar Heel contends that the individualized nature of the Dupont shuttle operation precludes performance by a common carrier, that the Commission erred as a matter of law in finding that Guignard's performance of the Dupont contract constitutes common carriage which Guignard is authorized to perform, and that Tar Heel's substantial rights have been prejudiced as a result. We agree and accordingly reverse on the ground that the order is affected by error of law. N.C. Gen. Stat. 62-94(b)(4).

With certain exceptions, see N.C. Gen. Stat. 62-260, -265, a person or entity wishing to engage in intrastate transportation of goods or passengers must receive authorization from the North Carolina Utilities Commission. N.C. Gen. Stat. 62-262. The Commission may authorize one of two types of operation: (1) it may

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grant a certificate authorizing performance as a common carrier, *i.e.*, "any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of persons or property or any class or classes thereof for compensation, whether over regular or irregular routes, except as exempted in G.S. 62-260," N.C. Gen. Stat. 62-3(7); or (2) it may issue a permit authorizing performance as a contract carrier by motor vehicle, *i.e.*,

any person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation other than the transportation referred to in subdivision (7) of this section, by motor vehicle of persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260.

N.C. Gen. Stat. 62-3(8). A common carrier must charge all customers uniform rates for the same kind and degree of services; contract carriers, by contrast, are not subject to this requirement. *Oil Co.*, 302 N.C. at 22, 27, 273 S.E. 2d at 237, 239.

It is clear from the above definitions that a contract carrier is not authorized to act as a common carrier. It may not offer its services to the general public. Indeed, it may serve "at most a very limited number of shippers, and then only under a private individual contract with each shipper to be served." Explanation of the North Carolina Truck Act of 1947, N.C. Utilities Comm. General Order No. 4066-A at 7 (1 June 1948).

It is equally clear from these and other provisions of the Public Utilities Act that a common carrier generally is not authorized to act as a contract carrier. N.C. Gen. Stat. 62-262(a) specifies: "Except as otherwise provided . . . , no person shall engage in the transportation of passengers or property in intrastate commerce unless such person shall have applied to and obtained from the Commission a *certificate or permit* authorizing such operations" (Emphasis supplied.) A "certificate" authorizes performance as a common carrier, N.C. Gen. Stat. 62-3(2), while a "permit" authorizes performance as a contract carrier, N.C. Gen. Stat. 62-3(20).

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The factors considered by the Commission in determining whether an applicant qualifies for a certificate of common carriage differ significantly from those considered in determining whether a contract carrier permit should be issued. An applicant for a certificate must demonstrate:

- (1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and
- (2) That the applicant is fit, willing and able to properly perform the proposed service, and
- (3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis.

N.C. Gen. Stat. 62-262(e). In determining whether to grant a permit the Commission must consider:

- (1) Whether the proposed operations conform with the definition . . . of a contract carrier,
- (2) Whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates, or rail carriers,
- (3) Whether the proposed service will unreasonably impair the use of the highways by the general public,
- (4) Whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier,
- (5) Whether the proposed operations will be consistent with the public interest and the policy declared in [the Public Utilities Act], and
- (6) Other matters tending to qualify or disqualify the applicants for a permit.

N.C. Gen. Stat. 62-262(i). In addition, N.C. Gen. Stat. 62-264 provides that "[u]nless the Commission, in its discretion, finds that the public interest so requires, no person . . . shall hold both a certificate as a common carrier and permit as a contract carrier."

Read together, these provisions manifest legislative intent to create two distinct types of transportation, each required to

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operate within its own boundary. To determine otherwise would strip the provisions of effect.

The prohibition against a common carrier acting as a contract carrier was explicitly stated by the Commission in its "Explanation of the North Carolina Truck Act of 1947":

[A common carrier] is not permitted to enter into private individual contracts or agreements with particular shippers with respect to *rates or services*. . . . If permitted to do that, the railroads would be serving particular shippers and special interests and not the general public. The Truck Act merely subjects [motor] carriers to the long established and well-known principles of law that apply to other common carriers. (Emphasis supplied.)

N.C. Utilities Comm. General Order No. 4066-A at 6 (1 June 1948).

On its face the rate tariff proposed by Guignard and approved by the Commission applies to the general public. It provides the following rates for the pick-up and delivery of textile products and equipment between Cape Fear, Maco and Wilmington, North Carolina:

ALL LOADS FROM 1 TO 259	\$35.95
ALL LOADS IN EXCESS OF 259	
BUT LESS THAN 300	\$33.00
ALL LOADS IN EXCESS OF 300	\$30.00

The terms of the Dupont contract, however, extend far beyond rates and customary pick-up and delivery. They require that Guignard dedicate equipment and drivers twenty-four hours a day, 365 days a year. Guignard has agreed to lease customized trailers from Dupont so that the plant's automatic loading system may be used. In addition, with each load the drivers must decide which of the two products produced at the plant must be transported. This requires the drivers to be aware of the relative speed at which each production line is moving and the extent to which the plant's limited storage capacity for each product is being used. It is clear that the parties envision a long-term contractual relationship.

In *Oil Co.*, 302 N.C. 14, 273 S.E. 2d 232, our Supreme Court implicitly recognized that, except as provided in N.C. Gen. Stat.

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62-264, a common carrier cannot legally operate as a contract carrier. There the Commission's approval of a dedicated service rate was challenged. The rate, filed by common carriers of petroleum products, provided lower charges to shippers who agreed to have a single unit of the carrier's equipment assigned exclusively to them for a minimum of one hundred hours per week for twenty consecutive weeks. The court first held that the reduction of rates for quantity shippers did not constitute an "unreasonable preference" in violation of N.C. Gen. Stat. 62-140. 302 N.C. at 24, 273 S.E. 2d at 238. It then questioned the effect of a common carrier's agreement to commit equipment to the exclusive use of a single shipper for a twenty-week period. The Court phrased the question as "whether a common carrier which commits a part of its equipment to dedicated use should be regarded as a matter of law as a contract carrier." 302 N.C. at 26, 273 S.E. 2d at 239. Relying on the definitions of common carrier and contract carrier, N.C. Gen. Stat. 62-3(7) and 62-3(8) respectively, the court stated that the "crucial test" in determining whether an entity is operating as a common carrier is whether it is holding itself out as such. *Id.* Noting that "the dedicated rate is equally available, and *on the same terms to all*," the court rejected the protestants' contention that the dedication of equipment amounted to contract carriage. 302 N.C. at 27, 273 S.E. 2d at 239. (Emphasis supplied.)

By contrast, nothing in the record here supports a finding that Guignard is holding itself out as willing to provide to the public the services it seeks to perform for Dupont. The tariff Guignard filed with the Commission does not mention its willingness to dedicate equipment and personnel to the exclusive use of other individual shippers. There is no evidence indicating that it is willing to lease special equipment to serve the individualized needs of other shippers or to train its employees to operate unique equipment belonging to other shippers and to make managerial decisions regarding the time and contents of shipments. Unlike the dedicated rate tariff filed in *Oil Co.*, the individually negotiated terms of the Dupont contract are not compatible with public service as a common carrier.

We note further that in determining that Guignard's proposed rates are just and reasonable the Commission relied heavily on the 259 loads per week minimum which Dupont guarantees Guignard. In addition, the Commission's computations made no

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allowances for public use of the tariff. That the Commission, in dealing with the question of profitability, looked only at transactions which might occur between Dupont and Guignard seems inconsistent with the concept of public ratemaking.

Prohibiting a common carrier from functioning as a contract carrier is well-grounded in transportation regulation theory. Regulation has created a protected market for common carriers. Entry into the transportation industry as a common carrier is limited. Those seeking a certificate must demonstrate a public need and an ability to meet it. See N.C. Gen. Stat. 62-262(e). Common carriers benefit from requirements that before issuing new certificates or permits the Commission must consider their effect on existing common carrier operations. See N.C. Gen. Stat. 62-262(e)(1), (i)(2).

Entry into the market as a contract carrier is purposely less restricted. See N.C. Gen. Stat. 62-262(i); see also W. Thoms, *Rollin' On . . . To a Free Market: Motor Carrier Regulation 1935-1980*, 13 Transp. L.J. 43, 52 (1983) (by analogy to federal regulation). The market of a contract carrier is, however, more limited than that of a common carrier. A contract carrier offers its services to a limited number of persons, not to the general public. *Id.* at 52-53; Explanation of the North Carolina Truck Act of 1947, *supra*, at 7.

Once authorized, a common carrier may achieve economies of scale which a contract carrier by definition generally cannot. To allow common carriers to compete with contract carriers for individual private contracts not only would potentially interfere with the common carrier's duty to serve the public, but could price contract carriers out of their only market as well. See J. Guandolo, *Transportation Law* 316-19 (3d ed. 1979).

Commentators have noted the advantages of a free market and recent movement toward deregulation. See, e.g., M. Pustay, *Intrastate Motor Carrier Regulatory Reform in South Dakota*, 52 Transp. Pract. J. 93 (1984) (noting relaxation of regulation in Arizona, Florida, South Dakota and Wisconsin); W. Thoms, *supra*, at 75-85 (noting partial federal deregulation). Our legislature has chosen to regulate the trucking industry, however, and neither the Utilities Commission nor this Court is free to ignore its mandates.

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For reasons stated above, the Commission's order is reversed. This disposition renders consideration of Tar Heel's other arguments unnecessary. We note that Guignard may, pursuant to N.C. Gen. Stat. 62-264, seek authorization for dual operations as a common carrier and a contract carrier, which the Commission may grant if it finds that such operations are in the public interest.

Reversed.

Judges WELLS and PHILLIPS concur.

GEOFFREY D. BRAUN v. GLADE VALLEY SCHOOL, INC., AND C. W. MACKEY

No. 8523SC89

(Filed 1 October 1985)

1. Fraud § 9— failure to rehire teacher at private school—cause of action for fraud— 12(b)(6) dismissal proper

The trial court did not err by granting defendants' motion under G.S. 1A-1, Rule 12(b)(6) to dismiss plaintiff's cause of action for fraud and deceit where plaintiff teacher alleged that defendants had made a representation that he would be rehired for the upcoming school year but plaintiff was ultimately not rehired. Fraud cannot be based on an allegation of a promise of future intent, plaintiff made no allegations that defendants intended to deceive him, and there were no allegations that defendants knew that the representation of future employment was false or was made recklessly without regard for its truth.

2. Fraud § 9— withdrawal of favorable recommendation—cause of action for fraud dismissed—proper

The trial court did not err by dismissing one of plaintiff's causes of action for fraud and deceit where plaintiff teacher alleged that defendants withdrew a highly favorable recommendation after receiving notice that plaintiff was seeking legal assistance regarding defendants' failure to rehire him. There was no allegation of a misrepresentation of any fact, past or present; no allegation of reliance by plaintiff; and no evidence of any fraudulent inducement by defendants. G.S. 1A-1, Rule 12(b)(6).

3. Schools § 13; Contracts § 26— failure to rehire teacher at private school—evidence concerning other teachers—properly excluded

In an action arising from the failure of a private boarding school to rehire plaintiff as a teacher because plaintiff did not have a multiple certification, the

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trial court did not err by excluding plaintiff's evidence that other teachers were employed without multiple certifications. Plaintiff's burden at trial was to prove the existence of a valid contract binding on the school and the breach of that contract; the evidence was not relevant to that issue.

4. Schools § 13; Contracts § 27.1— failure to rehire teacher at private school—directed verdict proper

The trial court did not err by granting defendants' motion for a directed verdict in an action arising from the failure of defendant private school to rehire plaintiff as a teacher where plaintiff had received an unsolicited letter from the headmaster stating that he planned for defendant to be part of the faculty during the next school year, but plaintiff had been employed by the school for the past six years with a written contract specifying terms such as salary, fringe benefits, length of employment, payment periods, duties, responsibilities, and housing. The letter relied on by plaintiff did not demonstrate that plaintiff and defendant reached a meeting of the minds as to the terms of employment.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 17 October 1984 in Superior Court, ALLEGHANY County. Heard in the Court of Appeals 30 August 1985.

Plaintiff filed this civil action seeking damages in tort and for breach of contract.

The essential facts are:

Glade Valley School (GVS) is an incorporated private boarding school. Defendant, C. W. Mackey, is its president and chief operating officer. Plaintiff, Geoffrey Braun, taught at the school, under a series of written one-year contracts, from 1977 to 1983. Plaintiff had been aware since 1978 that the school was experiencing financial difficulty. In the spring of 1983 there was speculation among faculty members as to whether the school would reopen for the upcoming fall term.

On 5 April 1983 defendant Mackey wrote and delivered the following letter to the plaintiff:

Dear Geoff,

I appreciate your thoughts and suggestions about the school. I am planning for you to be a part of our faculty next year.

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Although I believe your living off campus is not in the school's best interest, you are a valuable part of the school's academic program.

Yours truly,

s/ C. W. Mackey

C. W. Mackey

President

On 10 April 1983 the faculty at GVS was not paid because no money was available. On 4 May 1983 the Board of Trustees of GVS held a meeting. The plaintiff did not attend that meeting. On 6 May 1983 the plaintiff attended an administrative meeting with defendant Mackey and three other school administrators. At that meeting plaintiff was given a copy of a memorandum that would be distributed to the faculty later that same day. The memorandum stated that faculty members in the future would have to have multiple certification. Plaintiff was certified in only one subject area, social studies. Plaintiff was very surprised by this change of policy and stated during the meeting that it would be difficult for GVS to find teachers with multiple certifications.

Later the same day plaintiff met alone with defendant Mackey. It was at this meeting that plaintiff realized that he would not be rehired because of the policy change. Plaintiff was not rehired for the 1983-84 school year at GVS. He did receive some unemployment benefits and earned some money doing a variety of part-time jobs during the 1983-84 school year. In 1984 plaintiff became headmaster of a school in South Carolina.

At plaintiff's request defendant Mackey sent a letter of recommendation to plaintiff's alma mater, Middlebury College, to be placed in plaintiff's permanent placement file. The letter of recommendation was highly favorable. After receiving a letter from a South Carolina attorney on behalf of the plaintiff that threatened a lawsuit against the defendants, defendant Mackey caused the letter of recommendation to be withdrawn.

In their answer, defendants moved the court pursuant to Rule 12(b)(6) of the Rules of Civil Procedure to dismiss plaintiff's complaint. At the hearing on defendants' motion to dismiss, the trial judge dismissed plaintiff's second and third causes of action in tort. At the trial of the matter on plaintiff's first cause of ac-

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tion for breach of contract the defendants moved for a directed verdict at the close of plaintiff's evidence. The trial court granted defendants' motion.

From the dismissal of his second and third causes of action and the granting of a directed verdict in favor of the defendants, plaintiff appeals.

Edmund I. Adams, for the plaintiff-appellant.

Doughton and Evans, by Richard L. Doughton for defendant-appellee.

EAGLES, Judge.

I

Plaintiff first assigns as error that the trial court committed reversible error by dismissing plaintiff's second and third causes of action. We disagree.

A motion to dismiss under Rule 12(b)(6) is the usual and customary method of testing the legal sufficiency of the complaint. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). The facts pleaded in the complaint are the determining factors in deciding whether the complaint states a claim upon which relief can be granted. W. Shuford, North Carolina Civil Practice and Procedure Section 12-10 (1981). The legal theory set forth in the complaint does not determine the validity of the claim. *Benton v. W. H. Weaver Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975). A claim should not be dismissed pursuant to Rule 12(b)(6) unless it appears that the plaintiff is not entitled to any relief under any statement of facts which could be proved. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). While mere vagueness is not enough to dismiss the complaint, the complaint must state enough to satisfy the requirements of the substantive law giving rise to the claim. Merely asserting a grievance is not enough. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

Plaintiff contends that the defendants' conduct was tortious in two ways: one, by the deception of plaintiff and two, by the withdrawal of a highly complimentary recommendation in reprisal after plaintiff sought legal assistance. In his brief, plaintiff argues that the defendants' actions were deceitful and fraudulent. From

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a review of the facts as alleged in the complaint, we do not believe that the complaint alleges circumstances constituting fraud and deceit.

[1] In order to prove actionable fraud the plaintiff must show: (1) that the defendant made a representation of a material past or present fact; (2) that the representation was false; (3) that it was made by the defendant with knowledge that it was false or made recklessly without regard to its truth; (4) that the defendant intended that the plaintiff rely on the representation; (5) that the plaintiff did reasonably rely on it; and (6) injury. *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). As a general rule, a mere promissory representation will not support an action for fraud. *Id.*; *Pierce v. American Fidelity Fire Ins. Co., Inc.*, 240 N.C. 567, 83 S.E. 2d 493 (1954); *McCormick v. Jackson*, 209 N.C. 359, 183 S.E. 369 (1936). However, a promissory misrepresentation may constitute actual fraud if the misrepresentation is made with intent to deceive and with no intent to comply with the stated promise or representation. *Johnson v. Phoenix Mutual Life Ins. Co.*, *supra*; *Vincent v. Corbett*, 244 N.C. 469, 94 S.E. 2d 329 (1956).

One of the essential elements of actual fraud is that the defendant made some representation relating to a material existing or past fact. *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131 (1953). In plaintiff's second cause of action, plaintiff alleges in his complaint that the representation made by the defendants was that the plaintiff would be hired for the upcoming school year. This representation related to a future fulfillment and not a past or existing fact. The rule is that fraud cannot be based on an allegation of a promise of future intent. *Craig v. Texaco, Inc.*, 218 F. Supp. 789 (E.D. N.C. 1963), *aff'd*, 326 F. 2d 971 (4th Cir. 1964). Further, the plaintiff made no allegations as to the defendant's intent to deceive the plaintiff. There are no allegations in the complaint that the defendants knew the representation was false or made the representation recklessly and without regard for its truth.

[2] As to plaintiff's third cause of action, plaintiff complains that the defendants withdrew a highly favorable recommendation after receiving notice that the plaintiff was seeking legal assistance. Plaintiff alleges in his complaint that this conduct was in retribution for the plaintiff seeking legal advice and that it "was done

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with a vengeful motive toward Plaintiff for the specific purpose of injuring and damaging him." From these allegations there is no evidence of fraud or deceit. There is no allegation of a misrepresentation of *any* fact, past or present; there is no allegation of reliance by the plaintiff; and there is no evidence of any fraudulent inducement by the defendants. While the withdrawal of the recommendation may have hurt the plaintiff, he has made no allegations that the defendants were under any duty, by contract or otherwise, to make the recommendation and there are no facts alleged to support plaintiff's allegation that the withdrawal of the recommendation was wrongful. It is not sufficient to conclusively allege that the defendants' conduct was wrongful. We do not believe that the plaintiff has stated any cause of action sufficient under the substantive law of this state upon which relief from defendants' action could be granted.

For these reasons, plaintiff's first assignment of error is overruled.

II

[3] Plaintiff secondly urges that the trial court committed reversible error by sustaining defendants' objection to plaintiff's proffered evidence that GVS still employs teachers who do not have multiple certification. We disagree.

While the plaintiff was testifying on direct examination about the school's new policy requiring faculty members to have multiple certification, his attorney asked the following question:

Are there still teachers there [at GVS] who do not meet that criteria, that is, the multiple certification?

Defendants' attorney objected to this question and the objection was sustained.

The trial of this matter was held on plaintiff's first cause of action, breach of contract. We fail to see the relevancy of this question to the issue of whether or not the letter of 5 April 1983 constituted a valid contract between GVS and the plaintiff. Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. *Brandis*, *Brandis on North Carolina Evidence* Section 77 (rev. 2d ed. 1982). Evidence which is not relevant is not admissible. N.C. Rules of Evidence 402. At trial, the plain-

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tiff's burden was to prove the existence of a valid contract binding on GVS and the breach of that contract. No answer to the question was given for the record. We fail to see how any answer, affirmative or negative, would have had any relevance to the issues of the existence of a contract and breach of the contract.

The trial court properly sustained defense counsel's objection to the question and plaintiff's second assignment of error is overruled.

III

[4] In his remaining assignment of error plaintiff contends that the trial court committed reversible error by granting defendants' motion for a directed verdict and dismissing plaintiff's first cause of action at the close of plaintiff's evidence. We disagree.

The question for decision is whether the letter of 5 April 1983 constitutes a contract or offer to contract sufficient to support an action for damages for breach of its terms. The letter is not a complete contract within itself. This is obvious from the plaintiff's evidence and the defendants' exhibits. Plaintiff was employed by GVS for six years. For each of those previous six years plaintiff entered into a written contract with GVS, signed by the plaintiff and the defendant Mackey. Each contract specified with particularity the terms of plaintiff's employment such as salary, fringe benefits, length of employment—beginning date and ending date, payment periods, duties and responsibilities, and housing. Taking plaintiff's evidence as true and in the light most favorable to him, the plaintiff has shown that he received an unsolicited letter from defendant Mackey which stated that Mackey was "planning" for the plaintiff to be a part of the faculty during the next school year. At best, the letter constituted a future promise to enter into a contract in the future. In order to be binding, an offer to enter into a contract in the future must specify all the essential terms and leave nothing to be agreed upon as a result of future negotiations. To constitute a valid contract, the parties must assent to the same thing, their minds must meet as to all essential terms. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980).

From plaintiff's evidence, it is clear that the plaintiff and defendant Mackey never reached a mutual understanding as to sal-

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ary, fringe benefits, length of employment, duties and responsibilities, or housing arrangements. There was no meeting of the minds. Further, the letter does not constitute a present offer of employment for the following year. The writer was merely stating his plan or desire. He had reached no definite decision. When an offer and an acceptance are relied upon to make out a contract, the offer must be one that is intended to create a legal relationship upon acceptance. It cannot be an offer to open negotiations that eventually may result in a contract. *Yeager v. Dobbins*, 252 N.C. 824, 114 S.E. 2d 820 (1960).

Plaintiff's evidence failed to prove the existence of a valid contract and the trial court properly directed a verdict in favor of the defendants.

Affirmed.

Judges JOHNSON and PARKER concur.

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No. 8410SC1215

(Filed 1 October 1985)

Principal and Agent § 6; Compromise and Settlement § 1.1— compromise between defendant and plaintiff's insurer—pleaded as bar to defendant's counterclaim—ratified by plaintiff

The trial court correctly granted summary judgment for defendant in an action arising from a construction dispute where plaintiff filed an action against defendant, defendant filed an answer and counterclaim against plaintiff, plaintiff's insurer settled with defendant without plaintiff's consent, and plaintiff asserted that defendant's counterclaim was barred by the settlement. When a plaintiff pleads settlement and release as a bar to defendant's counterclaim, the pleading constitutes a ratification of the settlement and bars both plaintiff's and defendant's actions.

APPEAL by plaintiff from *Brannon, Judge*. Order entered 13 September 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 19 August 1985.

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Akins, Mann, Pike & Mercer by J. Jerome Hartzell for plaintiff appellant.

Poyner, Geraghty, Hartsfield & Townsend by David W. Long, Cecil W. Harrison and Susanna K. Gilchrist; and Taylor, Warren, Kerr & Walker by John H. Kerr for defendant appellee.

COZORT, Judge.

Plaintiff's principal assignment of error concerns the trial court's granting summary judgment for defendant. At the center of the controversy is a document entitled "Release in Full" which signifies a settlement agreement between defendant and plaintiff's insurance company. Plaintiff contends the trial court erred in granting summary judgment because it never ratified the document, or that at most, only ratified part of the agreement, and nevertheless by the terms of the document retained its right to sue. For the reasons stated below, we affirm.

Plaintiff and defendant were prime contractors in the construction of the Walter R. Davis Library at the University of North Carolina at Chapel Hill.

In September 1979, the State entered into contracts with plaintiff and defendant for the construction of the library. Defendant was the general contractor for the project and was responsible for furnishing labor and materials and performing certain work on this project. In addition to furnishing labor and materials, defendant was designated "Project Expediter," and as such, was responsible for coordinating all schedules and ongoing projects in the course of construction. Plaintiff was responsible for installation of the library's heating, ventilation, and air conditioning system.

Both plaintiff's and defendant's contract with the State contained identical provisions specifying that work would be performed within 930 consecutive calendar days. The construction project, however, experienced numerous delays and was not completed until well after the 930-day time period.

On 14 April 1983, a water line at the unfinished library was ruptured by plaintiff's construction crew. In the following months, defendant filed claims with plaintiff's insurance carrier, Aetna Casualty and Surety Co., for delays and damages to property.

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On 16 November 1983, plaintiff filed its lawsuit against the defendant seeking damages it allegedly suffered by reason of defendant's delay in completing its work on the library and the resulting interference with plaintiff's work on the library. In its complaint plaintiff alleged that defendant was responsible for maintaining certain progress on its own work and scheduling and coordinating the work of the other prime contractors; that defendant failed to timely complete its work as required by the September 1979 contract; and that plaintiff was delayed in performing its contract with the State and suffered \$350,000 in damages, by reason of defendant's failure to maintain progress and failure to coordinate progress on the job. Plaintiff contended that defendant was liable to it both by reason of breach of contract and under a theory of negligence.

On 23 January 1984, defendant filed its answer denying the bulk of plaintiff's allegations, moved to dismiss plaintiff's complaint under Rule 12(b)(6), and counterclaimed alleging that it had been damaged by reason of the broken water line for which plaintiff was responsible and also that plaintiff was liable to defendant for failure to pay its pro rata share of the power bills.

On 21 February 1984, upon receipt of \$136,445.29 from plaintiff's insurer in the ruptured water pipe claim it had filed with the insurer, defendant executed a "Release in Full" in which defendant

release[d] and forever discharge[d] the said Bolton Corporation and their representatives, Aetna Casualty & Surety Co. and all other persons, firms or corporations from all claims, demands, damages, actions, or causes of action, on account of damage to property, The Central Library, Chapel Hill, N. C. which occurred on or about the 14th day of April, 1983, by reason of water pipe breaking and of and for all claims or demands whatsoever in law or in equity, which it and its successors can, shall or may have by reason of any matter, cause or thing whatsoever prior to the date hereof.

* * * *

It is Understood and Agreed that this is a full and final release of all claims of every nature and kind whatsoever,

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and releases claims that are known and unknown, suspected and unsuspected.

Only defendant and accompanying witnesses signed the document.

The next day, 22 February 1984, plaintiff filed its reply to defendant's counterclaim asserting in its concluding paragraph that "any recovery sought is barred by the doctrine of accord and satisfaction, settlement and release."

On 3 August 1984, defendant moved for summary judgment pursuant to Rule 56, N.C. Rules Civ. Proc. Both parties submitted briefs, memoranda, and supporting exhibits. Defendant contended that plaintiff's plea of settlement and release was a binding ratification of the settlement between plaintiff's insurer, Aetna Casualty, and defendant, which barred plaintiff's original claim. The trial court granted defendant's motion for summary judgment in an order filed 13 September 1984.

On the issue of ratification of settlement, our Supreme Court has stated:

It seems to be well-nigh the universal holding in this country that where an insurance carrier makes a settlement in good faith, such settlement is binding on the insured as between him and the insurer, but that such settlement is not binding as between the insured and a third party where the settlement was made without the knowledge or consent of the insured or over his protest, unless the insured in the meantime has ratified such settlement.

Lampley v. Bell, 250 N.C. 713, 714, 110 S.E. 2d 316, 317 (1959). In *Patterson v. Lynch*, 266 N.C. 489, 493, 146 S.E. 2d 390, 393 (1966), the Supreme Court noted that "[o]ne of the most unequivocal methods of showing a ratification of an agent's unauthorized act is by bringing an action or basing a defense on the unauthorized act with full knowledge of the material facts." [Citation omitted.]

Here it is undisputed that at the time plaintiff's insurer settled with the defendant, plaintiff had not consented to the settlement but that at the time plaintiff filed its reply to defendant's counterclaim plaintiff had full knowledge of the material facts of the settlement and "Release in Full." Therefore, the question we

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must decide is whether plaintiff has ratified the compromise settlement by pleading the settlement and release in its reply as a bar to defendant's counterclaim, and, if so, whether the ratification of the settlement bars plaintiff's claim for damages presented in this lawsuit. At least in the context of motor vehicle negligence cases, this question has repeatedly been answered in the affirmative. See, e.g., *Keith v. Glenn*, 262 N.C. 284, 136 S.E. 2d 665 (1964); *Johnson v. Austin*, 29 N.C. App. 415, 224 S.E. 2d 293, cert. denied, 290 N.C. 308, 225 S.E. 2d 829 (1976); *White v. Perry*, 7 N.C. App. 36, 171 S.E. 2d 56 (1969).

In *Keith v. Glenn*, *supra*, the court phrased the issue as follows: "May plaintiff maintain his action against defendant and at the same time rely on the release given by defendant to defeat the counterclaim?" It ruled that "[u]nless we are to depart from logic and overrule prior decisions of this Court, the answer must be 'No.'" 262 N.C. at 286, 136 S.E. 2d at 667.

A consummated agreement to compromise and settle disputed claims is conclusive and binding on the parties to the agreement and those who knowingly accept its benefits. *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886; *Cannon v. Parker*, 249 N.C. 279, 106 S.E. 2d 229; *Houghton v. Harris*, 243 N.C. 92, 89 S.E. 2d 860; *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805

Id.

When a plaintiff pleads settlement and release as a bar to defendant's counterclaim, the pleading constitutes a ratification of the settlement and bars both plaintiff's and defendant's actions. *Keith v. Glenn*, *supra*; *Johnson v. Austin*, *supra*; *White v. Perry*, *supra*. We find this case to be governed by this rule.

Plaintiff argues that since defendant's original claim with Aetna was for the water damage incident, the resulting release should be narrowly construed in such a way as to limit ratification to the amount paid therefor. Such an interpretation is contrary to existing law and the broad language of the release itself. The release was not only for the water damage claim but "of and for all claims or demands whatsoever in law or in equity, which [TALCO] can, shall or may have" prior to the signing date of the release. A principal may not ratify the act of his agent in part and

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repudiate such act in part: "[H]e cannot take the rose without the thorns.' [Citations omitted.]" *Keith v. Glenn, supra*, 262 N.C. at 287, 136 S.E. 2d at 668.

In the case *sub judice*, plaintiff had several options open to it, each of which has its benefits and risks or burdens. The first option the plaintiff had was to ratify the settlement. At least two ways a plaintiff may ratify a settlement are by (1) pleading settlement and release to bar defendant's counterclaim, or (2) by moving to strike the counterclaim based on the release. *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E. 2d 585, *cert. denied*, 283 N.C. 665, 197 S.E. 2d 874 (1973). The benefit of such action is to bar defendant's counterclaim and thus avoid the possibility of having to pay a judgment without the benefit of liability insurance. The burden of such action is that plaintiff's claims are also barred.

As second option, plaintiff can choose not to ratify the compromise settlement. The benefit of such action is plaintiff preserves its right of action against the defendant. *See Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886 (1963); *McKinney v. Morrow, supra*. The burden of such an action is that defendant still has the right to bring its counterclaim; and while plaintiff may maintain its action, it does so at the risk that if defendant prevails, plaintiff may have to pay a judgment without the benefit of liability insurance. *Bradford v. Kelly, supra; McKinney v. Morrow, supra*. Likewise, if defendant prevails, it can look only to the plaintiff for payment because, by settling with the insurer, defendant has bought his peace with the insurer and released it from liability. *See Bradford v. Kelly, supra*, 260 N.C. at 388, 132 S.E. 2d at 890.

Of course, as a matter of equity, "[i]f the defendant does obtain a judgment against the plaintiff, the amount of liability must be diminished by the amount previously paid to the defendant by plaintiff's insurance carrier." *McKinney v. Morrow, supra*, 18 N.C. App. at 284, 196 S.E. 2d at 587, *citing Bradford v. Kelly, supra*.

Finally, plaintiff relies heavily on the final paragraph of the "Release in Full" which states:

It is further understood and agreed that any party hereby released admits no liability to the undersigned or any others, shall not be estopped or otherwise barred from asserting, and expressly reserves the right to assert any claim

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or cause of action such party may have against the undersigned or any others.

Plaintiff argues that even if it did ratify the settlement and release that the above language gives it the right to maintain its action. Had the plaintiff been a true party to the settlement, that is, if plaintiff had consented to the settlement at the time the "Release in Full" was executed, plaintiff's argument would have validity. Plaintiff, however, did not consent to the settlement at the time the "Release in Full" was executed. As such the above language is merely a restatement of the law concerning a non-consenting insured's rights: that by not consenting to its insurer's settlement and release, it retained its right to pursue any claims it may have against the defendant. However, once plaintiff ratified the compromise settlement, it gave up this right.

To allow plaintiff to plead the release to bar defendant's counterclaims and yet allow plaintiff to pursue his original claims would materially change the terms or understanding upon which defendant bargained with plaintiff's insurer. When a defendant-claimant settles with plaintiff's insurer without plaintiff's knowledge or consent, defendant does so with the knowledge that the plaintiff may still pursue whatever claims it may have against the defendant. Defendant, however, may still take comfort in the fact that unless and until plaintiff-insured ratifies the settlement, defendant may seek *full* recovery for his claims against the plaintiff, though it may no longer look to plaintiff's insurer for the payment of any judgment it may obtain.

To adopt plaintiff's position in this case would in effect prevent insurers from settling claims, in good faith, without the insured's consent. A defendant-claimant would have little incentive to compromise its claims if a plaintiff-insured, without ratifying the settlement and compromising its claims, could pursue its claims in full and at the same time bar the defendant's claims and thereby prevent the defendant from pursuing a full recovery.

In sum, by pleading settlement and release in bar to defendant's counterclaim, plaintiff ratified the compromise settlement and effectively barred defendant's counterclaim, but at the same time, plaintiff compromised its claims and barred its original action as well. We hold that the trial court properly granted summary judgment for the defendant.

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Since summary judgment was properly granted, it is unnecessary to address the parties' remaining assignments of error.

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

ELIZABETH C. LESSARD, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE
OF DENISE RENEE LESSARD v. LOUIS RAYMOND LESSARD

No. 8526DC41

(Filed 1 October 1985)

1. Death § 9; Parent and Child § 5.2— deceased daughter— wrongful death settlement—action to exclude father for abandonment—summary judgment improper

The trial court erred by granting summary judgment for defendant in an action in which plaintiff sought to exclude her former husband from all rights to the estate of their deceased daughter, which consisted of a wrongful death settlement, on the grounds that he had wrongfully abandoned her. The materials submitted by defendant tended to show that he maintained contact as close as could be expected considering his occupation and circumstances and negated the willfulness of his failure to provide financial support, while the materials submitted by plaintiff showed that defendant made few if any attempts to manifest any love and concern for or interest in the child, refused to perform a natural obligation of parental care by declining to permit the child to live in his home, and would support a finding that defendant willfully and intentionally refused to make any support payments after June of 1981. G.S. 1A-1, Rule 56(c), G.S. 31A-2.

2. Death § 9; Parent and Child § 5.2— deceased daughter— wrongful death settlement—exclusion of father for failure to comply with support order—summary judgment improper

Defendant did not establish substantial compliance as a matter of law with a judgment requiring support of his child, and summary judgment was improperly entered for him in an action to bar him from proceeds of the child's estate, where defendant paid the required amount of \$230 per month for the support of plaintiff and her minor children until he accepted plaintiff's offer to reduce the amount to \$150 and transferred the title to his mobile home to her, paid \$150 a month until he retired from the Army, and then was without means to continue the payments. The court order was never modified to authorize payment of any lesser amount and defendant failed to comply with the court's order in any respect during the last nine months of his daughter's life. G.S. 31A-2(2).

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Judge WEBB dissenting.

Judge BECTON concurring in the result.

APPEAL by plaintiff from *Lanning, Judge*. Order entered 13 August 1984 in District Court, MECKLENBURG County. Heard in the Court of Appeals 27 August 1985.

Plaintiff brought this action to exclude defendant, her former husband, from all rights to intestate succession in the estate of the parties' deceased daughter, Denise Renee Lessard, who died on 7 February 1982. The child's estate consists of the proceeds of a settlement for her wrongful death. Plaintiff alleged that because the defendant had wilfully abandoned the care and maintenance of the daughter, his rights to share in her estate were barred by the provisions of G.S. 31A-2. Plaintiff, by an amendment to the complaint, alleged a second cause of action for accrued alimony and child support to which she claimed she was entitled pursuant to a consent judgment entered in Cumberland County, which also awarded her custody of the two minor children of the marriage.

Defendant moved to dismiss all claims and filed answer, denying that he had wilfully abandoned his daughter and asserting that he had substantially complied with all court orders requiring him to contribute to the daughter's support. As to plaintiff's claim for accrued alimony and child support, defendant admitted that the Cumberland County consent judgment required him to pay \$230.00 per month for support of plaintiff and the minor children, but he alleged that plaintiff had thereafter agreed to accept title to a mobile home in full settlement of her alimony claim and that defendant would be required to pay only \$150.00 per month for child support.

Upon a previous appeal of this case, we held that defendant's motions to dismiss plaintiff's first claim were properly denied, but that the defendant's motions to dismiss the second claim for relief for arrearages in alimony and child support should have been allowed because the District Court in Mecklenburg County had no jurisdiction as to that matter. The case was remanded for further proceedings with respect to the first claim. *Lessard v. Lessard*, 68 N.C. App. 760, 316 S.E. 2d 96 (1984).

Upon remand, defendant moved for summary judgment on the grounds that he had substantially complied with all orders for

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support of his daughter and was therefore entitled to share in her estate pursuant to the provisions of G.S. 31A-2(2). The trial court granted defendant's motion and dismissed the action. Plaintiff appeals.

Erwin & Beddow, P.A., by Fenton T. Erwin, Jr., for plaintiff appellant.

Curtis & Millsaps, by Joe T. Millsaps, for defendant appellee.

MARTIN, Judge.

The sole issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant. Because the record discloses the existence of genuine issues of material fact, we hold that summary judgment was improvidently granted.

G.S. 1A, Rule 56(c) provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions in file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." The rule authorizes the court to determine whether a genuine issue of fact exists, but does not authorize the court to resolve an issue of fact. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). The party moving for summary judgment has the burden of showing the lack of any triable issue of fact; his papers are carefully scrutinized and those of the non-movant are indulgently regarded. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied*, 281 N.C. 516 (1972). If the evidentiary materials filed by the parties disclose the existence of a genuine issue of material fact, summary judgment must be denied.

The provisions of G.S. 31A-2 pertinent to this case are as follows:

Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except—

. . . .

(2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction

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and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

The proceeds of a settlement for wrongful death of a child are subject to the provisions of G.S. 31A-2 even though such proceeds are not assets of the estate of the deceased child. *Williford v. Williford*, 288 N.C. 506, 219 S.E. 2d 220 (1975). In order to establish that he is entitled to summary judgment in his favor, then, the burden is upon the defendant to show that no triable issue of fact exists and that, as a matter of law, he did not abandon Denise Renee Lessard, or failing in this, that, as a matter of law, he substantially complied with all court orders for her support.

[1] The first question for our determination is whether defendant carried his burden of showing no triable issue of fact as to his alleged abandonment of Denise Renee Lessard and of establishing, as a matter of law, that he did not abandon her. In her verified complaint, plaintiff alleged that defendant last visited his daughter prior to 1977, that he did not send cards or gifts to her on her birthday or at Christmas and did not contact her by telephone or mail. Plaintiff also alleged that defendant had made no payments for the support of his daughter during the last 9 months of her life and told plaintiff that he would make no more payments. By affidavit, plaintiff asserted that she had requested defendant to allow the child "to come to stay with him for a while" due to a threat on her life, and that defendant had never replied. Defendant, in his verified answer, asserted that he visited with both of his children on two occasions in both 1977 and 1978 and that he bought them gifts and purchased clothing for them. He acknowledged that he had not permitted his daughter to come and live with him, but asserted that due to his work schedule and that of his present wife, the child would not have been properly supervised. He maintained that close contact with the children was not possible due to his military career and the location of his various duty assignments. By affidavit, defendant admitted having made no support payments from June 1981 until the child's death in February 1982 but asserted, as a reason, that he had retired from the Army and was financially unable to comply with the court's order for support.

In *Pratt v. Bishop*, 257 N.C. 486, 126 S.E. 2d 597 (1962), our Supreme Court considered the sufficiency of evidence of abandon-

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ment to overrule nonsuit in an adoption proceeding. The Court defined abandonment as:

[A]ny wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. [Citations omitted.] Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence.

. . . .

Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. [Citation omitted.]

Id. at 501, 126 S.E. 2d at 608.

The pleadings and affidavits submitted for consideration by the court are in conflict and support opposing conclusions. While the materials submitted by defendant tend to show that he maintained as close contact with his daughter as could be expected considering his occupation and circumstances, the materials submitted by the plaintiff tend to support the conclusion that defendant made few, if any, attempts to manifest any love and concern for, or interest in, the child, and refused to perform "a natural obligation of parental care" by declining to permit the child to live in his home. Although defendant's affidavit negates the wilfulness of his failure to provide financial support during the last 9 months of the child's life, plaintiff's evidence would support a finding that he wilfully and intentionally refused to make any further payments after June, 1981. We conclude that a genuine issue of fact exists as to whether or not defendant abandoned his daughter.

[2] Having concluded that the issue of abandonment may not be appropriately resolved by summary judgment, we must next determine whether defendant has established, as a matter of law, his substantial compliance with the Cumberland County judgment requiring his financial support of the child. If so, G.S. 31A-2(2) per-

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mits him to share in the wrongful death proceeds notwithstanding an abandonment of the daughter by him.

In support of his claim of substantial compliance defendant presented evidence to the effect that a consent judgment was entered in the District Court of Cumberland County on 5 July 1968 requiring him to pay \$230.00 per month for the support of the plaintiff and the two minor children. He asserts that he made the required payments until 1970, when plaintiff offered to reduce the support to \$150.00 per month if he would transfer the title to his mobile home to her. Defendant claims that he accepted the offer, transferred the title, and from October 1971 until May 1981, made \$150.00 per month payments for child support. Upon his retirement from the Army he was without the financial means to continue those payments. Defendant's contention is that by making those child support payments, he has shown, as a matter of law, substantial compliance with the court's order. We disagree.

We first observe that the Cumberland County order required payments of \$230.00 per month "for the support of the plaintiff and the minor children." From 1971 until 1981, defendant made payments of only \$150.00. Notwithstanding his contentions concerning transfer of the trailer title, which are specifically denied by plaintiff in her affidavit, the court order was never modified to authorize payment of any lesser amount, or to allocate any portions of the payments to child support or alimony. Moreover, for the final 9 months of the daughter's life, defendant contributed nothing to her support and thereby failed to comply in any respect with the court's order. Since the evidentiary forecasts support differing inferences and conclusions, we believe the issue of substantial compliance must also be resolved by the fact-finder, rather than by the court on motion for summary judgment.

Accordingly, we reverse the entry of summary judgment for defendant and remand this case to the District Court of Mecklenburg County for trial.

Reversed and remanded.

Judge BECTON concurs in the result.

Judge WEBB dissents.

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Judge WEBB dissenting.

I dissent. All the evidence shows that the defendant supported his children for many years. He had lost custody of them and could not be expected to maintain the close contact with which he would have otherwise had. I do not believe the fact that he did not contribute to his daughter's support for the last nine months of her life would support a finding that he had abandoned her. I vote to affirm the judgment of the District Court.

Judge BECTON concurring in the result.

Were I asked to resolve the issues of abandonment and "substantial compliance," I would unhesitatingly conclude, on the facts in the record before us, that the father neither abandoned his daughter nor failed to comply substantially with court orders requiring him to contribute to her support. And, if I were compelled by equitable principles to reach a compromising *quid pro quo* result, I would grant to the father the same percentage of the wrongful death proceeds that he contributed to his daughter's support, considering the 5 July 1968 judgment. The trial court, however, granted the father's motion for summary judgment, and I can neither resolve factual disputes nor otherwise dispose of the case, as a matter of law, on the merits. Consequently, I concur in the result.

STATE OF NORTH CAROLINA v. WILLIAM COLE BARTOW

No. 855SC45

(Filed 1 October 1985)

1. Criminal Law § 66.9—photographic identification—defendant's photograph distinguishable—photographs altered—not unduly suggestive

The trial court did not err in a prosecution for armed robbery by not suppressing an out-of-court photographic identification of defendant by the victim where the photographs had been altered by drawing eyeglasses on each picture to conform to the victim's description of the robber and defendant was the only person pictured having cuts and bruises on his face and wearing dark clothes. The alteration of the photographs was not impermissibly suggestive since all of the photographs were similarly altered and the cuts, bruises, and dark clothing were not unduly suggestive because the victim had not described the robber as having those features.

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2. Criminal Law § 38— armed robbery—previous incidents—admissible

The trial court did not err in a prosecution for armed robbery of a Domino's Pizza delivery person by allowing the owner of the Domino's to testify as to an earlier incident in which defendant, a former Domino's employee, had ordered a pizza under a different name and using the address of the house across the street from where he was staying; defendant met the owner in the street when the owner came to deliver the pizza; defendant was not immediately recognized by the owner because he was wearing eyeglasses and had a mustache drawn on his face, which the owner had not previously seen; and defendant left to get money for the pizza, returned and said he did not have the money, and did not answer when asked why he had ordered the pizza. The testimony was relevant to show identity and plan because of similarities between the incident and the robbery. G.S. 8C-1, Rule 404(b) of the North Carolina Rules of Evidence (1983 Cum. Supp.).

3. Robbery § 4.3— armed robbery—endangering or threatening victim—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where the robber held a gun in his hands parallel to the victim's car within six inches to one foot from the victim's face during the robbery, showed the victim that he had a gun, and told her that she would not get hurt if she stayed calm and did as he directed. G.S. 14-87.

4. Criminal Law § 122.1— jury's request for reinstruction—defendant's request for additional instruction denied—no error

The trial court did not err in a prosecution for robbery with a dangerous weapon where the jury requested reinstruction on the definitions of robbery with a firearm and common law robbery, the court reinstructed on the definitions of the offenses but refused to reinstruct that mere possession of a firearm did not by itself constitute endangering or threatening the life of the victim as requested by defendant, and the instruction requested by defendant had been included in the court's original charge to the jury. The court is not required to repeat instructions which were previously given to the jury in the absence of some error in the charge. G.S. 15A-1234 (1983).

APPEAL by defendant from *Strickland, Judge*. Judgment entered 10 July 1984 in NEW HANOVER County Superior Court. Heard in the Court of Appeals 13 August 1985.

Defendant was charged in a true bill of indictment with robbery with a dangerous weapon. He was accused of stealing and carrying away, with the use of a handgun, personal property of the value of \$179.52 from Judy E. Hales, a delivery person for Domino's Pizza ("Domino's"), on 14 February 1984. A jury found defendant guilty as charged. From a judgment of imprisonment entered upon the conviction, defendant appealed.

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Attorney General Lacy H. Thornburg, by Associate Attorney Michael Smith and Associate Attorney Abraham P. Jones, for the State.

Zimmer and Zimmer, by Jeffrey L. Zimmer and Melinda Haynie, for defendant.

WELLS, Judge.

[1] Defendant first argues that the trial court erred by not suppressing evidence of Ms. Hales' out-of-court photographic identification of him as the perpetrator of the robbery. He contends the identification procedure was impermissibly suggestive because (1) the photographs shown to Ms. Hales were altered by the drawing of eyeglasses on each person pictured so as to conform to Ms. Hales' description of the robber, and (2) because his photograph was distinguishable from the others in that he was the only person pictured having cuts and bruises on his face and wearing dark clothing. Defendant further argues that the court erred in allowing Ms. Hales' in-court identification of him when such identification was based on the impermissibly suggestive out-of-court identification rather than being of independent origin.

Prior to trial defendant moved to suppress both the photographic identification and any in-court identification of him by Ms. Hales. A *voir dire* was held at trial on defendant's motion at the conclusion of which the court made findings of fact which are summarized as follows: The robbery occurred at the intersection of two streets in Wilmington approximately 15 feet away from an outside light on a lamppost. Ms. Hales shined her flashlight in the perpetrator's face and the bright lights of her automobile were on while the perpetrator was standing in front of the automobile. The perpetrator and Ms. Hales were in each other's presence for about five minutes during which time the perpetrator got between six inches and one foot from Ms. Hales' face. Ms. Hales observed the perpetrator's clothing, his height and his race. She described him as being six feet tall and white, and wearing a foreign legion type hat, a green jacket, jeans and tennis shoes. She also described the perpetrator as wearing heavy-rimmed eyeglasses. She did not indicate to the investigating officers that the perpetrator had any red marks, cuts, or bruises on his face. Ms. Hales did not know defendant before the offense occurred and has

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not previously made an erroneous identification of any other person.

The court further found as follows: Thirteen days after the robbery, Officer Landry of the New Hanover County Sheriff's Department acquired photographs of seven young white males, none of whom wore eyeglasses, and with a grease pencil drew in eyeglasses on the front view of each individual. The eyebrows of several of the persons in the photographs were covered by the eyeglasses drawn in by Officer Landry. All of the individuals in the photographs were wearing light clothing except for defendant; however, Ms. Hales never advised Officer Landry as to whether the perpetrator was wearing light or dark clothing. All of the photographs were similar in type in that they were mug shots showing both the front and side views of each person. On 28 February 1984, Ms. Hales was shown the photographs and was told only to look cautiously through them. She was not told whether a photograph of the suspect was in the group of photographs. Ms. Hales went through the photographs one time, hesitating once, then looked back through the photographs and picked out the photograph of defendant which she positively identified as a photograph of the perpetrator of the robbery. While Ms. Hales was observing the photographs, Officer Landry was not close to her, nor did he make any suggestions or comments to her whatsoever either before or while she was going through the photographs. Ms. Hales' photographic identification of defendant on 28 February 1984 was the only identification made by her outside of court.

Based on these findings, the court concluded that the pre-trial photographic identification procedure involving defendant was not suggestive or conducive to irreparable mistaken identification so as to violate defendant's due process rights. The court further concluded that Ms. Hales' in-court identification of defendant was of independent origin based solely on what she saw at the time of the robbery and was not tainted by any unnecessarily suggestive pre-trial identification procedure, and denied the motion to suppress.

The findings made by a court in determining whether identification testimony is admissible are conclusive on appeal if supported by competent evidence. *State v. Woods*, 286 N.C. 612, 213

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S.E. 2d 214 (1975), *modified*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3207 (1976); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). We conclude from our examination of the record that plenary evidence was presented which supports the findings made here. The findings made support the conclusions reached and the decision rendered by the trial court. The alteration of the photographs was not impermissibly suggestive since all of the photographs were similarly altered. The fact that defendant was the only person pictured having cuts and bruises on his face and wearing dark clothing did not cause the identification procedure to be unduly suggestive since Ms. Hales had not described the perpetrator as having these distinguishing features. It does not appear that the identification procedure was in any other way suggestive or improper. Since the pre-trial identification procedure was not impermissibly suggestive, it follows *a fortiori* that Ms. Hales' in-court identification of defendant was not tainted thereby. See *State v. Hannah*, 312 N.C. 286, 322 S.E. 2d 148 (1984); *State v. Melvin*, 53 N.C. App. 421, 281 S.E. 2d 97 (1981), *cert. denied*, 305 N.C. 762, 292 S.E. 2d 578 (1982). Accordingly, we find no error in the admission of Ms. Hales' identification testimony.

[2] Defendant next contends the court erred in allowing a witness, Robert Huth, to testify for the State on rebuttal regarding an incident with defendant which occurred on 26 February 1984. Defendant denied any involvement with the robbery and presented evidence showing that he was at his apartment with a friend when the robbery occurred. Defendant's testimony also tends to show the following: Defendant was employed as a driver for Domino's from October, 1983 until December, 1983. In December, 1983, defendant had a fight with another employee of Domino's. Defendant terminated his employment with Domino's two days later. He indicated that he had trouble with employees or managers of Domino's several times in the past. After he terminated his employment with Domino's, defendant occasionally ordered a pizza from Domino's under a different name. At all times relevant to this action, Robert Huth was the owner of Domino's and in charge of the business. On 26 February 1984, defendant ordered a pizza from Domino's using a different name and gave as his address the address of the house across the street from where he was living. Huth delivered the pizza. When Huth arrived, defendant met him in the street and told him he had to get some money. Defendant

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left briefly. When he returned, he told Huth he could not get the pizza.

In rebuttal of defendant's evidence, Huth testified about the 26 February 1984 incident with defendant. Huth's testimony shows the following, in pertinent part: The order placed by defendant on 26 February 1984 attracted Huth's attention because it was allegedly called in from a house across the street from where defendant was staying. Huth determined that the pizza had not been ordered by the people living at the address given but, nevertheless, instructed that the pizza be made. When Huth drove to the address to which he was to deliver the pizza, he saw a person in the street. He asked the person if he had ordered the pizza. Huth then recognized the person as defendant. Huth did not immediately recognize defendant because defendant was wearing dark-rimmed, thick-lensed eyeglasses, had a "fu manchu" mustache drawn on his face which extended to the base of his jaw, had a cap pulled down tightly over his head so that it almost reached the top of his eyeglasses, and had his collar turned up on his coat. Huth had never previously seen defendant with any facial hair or wearing eyeglasses. Defendant and Huth talked briefly, then defendant left to get money for the pizza. When he returned, he told Huth he did not have the money. Defendant did not respond when Huth asked him why he had ordered the pizza when he did not have money to pay for it.

Defendant contends that Huth's rebuttal testimony was irrelevant; that any probative value of the testimony was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury; and that its admission constitutes prejudicial error. He further asserts that this testimony should not have been admitted even if offered by the State to show the identity of the robber because more accurate means of establishing the robber's identity were available to the State.

N.C. Gen. Stat. § 8C-1, Rule 404(b) of the N.C. Rules of Evidence (1983 Cum. Supp.) provides: "Evidence of other . . . acts is not admissible to prove the character of a person . . . to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." This provision is consistent

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with the practice in this State prior to adoption of N.C. Gen. Stat. § 8C-1, the N.C. Rules of Evidence. *See* Commentary to G.S. § 8C-1, Rule 404(b). *See also* 1 Brandis, *N.C. Evidence* § 111 (2d rev. ed. 1982 and 1983 Supplement). If such evidence is offered to prove something other than character, the trial court must determine whether the risk of undue prejudice outweighs the probative value of the evidence, in view of the availability of the other means of proof. *See* Commentary to G.S. § 8C-1, Rule 404(b).

The evidence in question here was clearly relevant and competent for purposes other than to show defendant's character. Because of certain similarities between the robbery and the 26 February 1984 incident, Huth's rebuttal testimony was particularly relevant to show identity and plan. The risk of undue prejudice resulting from the admission of the evidence was relatively slight and does not appear to have outweighed the probative value of the evidence, even in view of the possible availability of other means of proof. We therefore find no error in the admission of this evidence.

[3] Defendant contends the trial court erred in denying his motion to dismiss the charge at the conclusion of the evidence when substantial evidence was not presented to show that he endangered or threatened the life of Ms. Hales. Defendant correctly notes that mere possession of a firearm during the course of a robbery is insufficient to support a conviction for robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87 (1981); rather, the statute requires both possession and an act with the weapon which endangers or threatens the life of the victim. *See State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981).

The evidence shows that the robber held a gun in his hands parallel to the car within six inches to one foot from Ms. Hales' face during the robbery, that he showed Ms. Hales that he had a gun, and told her that she would not get hurt if she stayed calm and did as he directed. Such conduct by defendant constituted a threatened use of a firearm which endangered or threatened Ms. Hales' life within the meaning of G.S. § 14-87. *See State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984); *State v. Melvin*, 53 N.C. App. 421, 281 S.E. 2d 97 (1981), *cert. denied*, 305 N.C. 762, 292 S.E. 2d 578 (1982). Sufficient evidence of this element of the

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offense was therefore presented to justify submission of the case to the jury. Accordingly, we find no error in the denial of defendant's motion to dismiss.

[4] Lastly, defendant contends the court erred in refusing to give certain additional instructions in response to a question from the jury. After deliberating a short while, the jury requested re-instructions on the definitions of robbery with a firearm and common law robbery. The court reinstructed on the definitions of the offenses but refused to reinstruct that "mere possession of a firearm does not by itself constitute endangering or threatening the life of the victim" as requested by defendant. The instruction requested by defendant was included in the court's original charge to the jury.

N.C. Gen. Stat. § 15A-1234 (1983) provides that the court may give appropriate additional instructions to "[r]espond to an inquiry of the jury made in open court." The court is not required to repeat instructions which were previously given to the jury in the absence of some error in the charge but may do so in its discretion. *State v. Hockett*, 309 N.C. 794, 309 S.E. 2d 249 (1983). See also *State v. Southern*, 71 N.C. App. 563, 322 S.E. 2d 617 (1984), *aff'd*, 314 N.C. 110, 331 S.E. 2d 688 (1985). We find no abuse of the court's discretion here in refusing to give the reinstructions requested by defendant and thus no error.

No error.

Chief Judge HEDRICK and Judge WEBB concur.

IN RE: DAVID LARRY BASS

No. 8414DC1153

(Filed 1 October 1985)

1. Infants § 16— juvenile charged with felonious larceny—no probable cause hearing—no prejudice

There was no prejudice from the trial judge's failure to hold a probable cause hearing before adjudicating respondent delinquent even though respondent's counsel did not realize until its conclusion that the hearing was adjudicatory rather than to determine probable cause. The hearing had been set

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as a hearing on the merits in open court, respondent and his counsel were present and made no objection, respondent's counsel gave no indication that he was not prepared or had not been furnished with requested discovery when the case was called, and respondent's counsel declined to present further evidence when given the opportunity to do so after he informed the court of his misunderstanding. A probable cause hearing is not conducted for purposes of discovery, the statement of a co-respondent which was not provided to respondent before the hearing was substantially more damaging than his testimony at the hearing, and respondent's counsel wisely limited his cross-examination of the co-respondent to an admission that he lied. G.S. 7A-609(a), G.S. 15A-606(a).

2. Larceny § 7.7— juvenile—larceny of truck—evidence sufficient

The trial court did not err by denying a juvenile's motion to dismiss the charge of felonious larceny where the evidence presented by the State tended to show that respondent and three others noticed that the keys had been left in a truck, the four of them made a plan to steal the truck, two of them took the truck while respondent and the fourth waited a block away, the first two picked up respondent and his companion, the employer of the owner of the truck gave chase and blocked the road, and the employer recognized respondent when the occupants of the truck jumped out and ran away. G.S. 14-72, G.S. 14-5.2.

3. Infants § 15— adjudication of delinquency—failure to release pending appeal—no prejudice

A juvenile adjudicated delinquent was not prejudiced by the trial judge's failure to release him pending appeal or to state in writing compelling reasons why he should not be released. The error was in a post-trial procedure which could not have prejudiced respondent in the adjudication and the commitment order was based in part on a finding that respondent had violated probation, which would support the commitment order independently of the adjudication of delinquency. G.S. 7A-668.

APPEAL by respondent from *Read, Judge*. Judgment entered 6 August 1984 in District Court, DURHAM County. Heard in the Court of Appeals 22 August 1985.

On 20 December 1983 respondent was adjudged to be delinquent following a finding that he had committed an assault. On 7 February 1984, after a dispositional hearing, respondent was placed on probation. On 14 June 1984, the juvenile probation officer filed a motion for review alleging that respondent had violated his probation in several respects. On 19 July 1984, a juvenile petition was filed alleging that respondent had, on 17 July 1984, committed felonious larceny. On 30 July 1984, Judge LaBarre found that respondent had committed the offense of felonious larceny and adjudged him to be delinquent. At the same hearing respondent was also found to have violated the terms of

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his probation by running away from home. A dispositional hearing was scheduled and conducted on 6 August 1984 before Judge Read and respondent was committed to the Department of Human Resources, Division of Youth Services pursuant to G.S. 7A-652. Respondent appeals.

Attorney General Lacy H. Thornburg by Assistant Attorney General Jane Rankin Thompson for the State.

Alexander Charms for respondent appellant.

MARTIN, Judge.

We note at the outset that the record on appeal does not contain "a copy of the notice of appeal, or of an appropriate entry showing appeal taken orally" as required by Rule 9(a)(3)(viii) of the Rules of Appellate Procedure. Respondent's assignments of error relate only to the adjudication of his delinquency based upon the court's finding that he committed felonious larceny. In the exercise of our discretion, we will consider the assignments of error relating to the felonious larceny adjudication. However, respondent having failed to assign error to the court's finding of delinquency based upon his probation violation, we decline to review that portion of the complained-of order. Although we find technical error in the trial court's failure to conduct a probable cause hearing as required by G.S. 7A-609, we conclude that such error resulted in no prejudice to respondent. We affirm the trial court's order adjudicating respondent a delinquent juvenile pursuant to G.S. 7A-517(12).

[1] Respondent first assigns error to the trial court's failure to conduct a probable cause hearing prior to the adjudicatory hearing at which he was found delinquent. G.S. 7A-609(a) provides in part:

The judge shall conduct a hearing to determine probable cause in *all felony cases* in which a juvenile was 14 years of age or older when the offense was allegedly committed unless counsel for the juvenile waives in writing his right to the hearing and stipulates to a finding of probable cause. (Emphasis added.)

In re Bullard, 22 N.C. App. 245, 206 S.E. 2d 305 (1974), this court held that the provisions of former G.S. 7A-280 (repealed 1979),

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containing language similar to the present G.S. 7A-609(a), required the district court to conduct a preliminary hearing to determine whether there was probable cause to believe that the juvenile had committed the offense charged. We believe that the language of G.S. 7A-609(a) is clear and requires that a probable cause hearing be conducted in all cases in which a minor 14 years of age or older is charged with a felony before the court may transfer the case to the superior court for trial, or proceed with an adjudicatory hearing in the district court.

Respondent contends that the failure of the trial court to hold the probable cause hearing was prejudicial and a denial of due process of law. Although it was error for the trial court to fail to conduct a probable cause hearing, we do not agree that the error was prejudicial to respondent. Our Supreme Court has held, with respect to adult offenders, that a failure to provide a criminal defendant with a probable cause hearing, as required by G.S. 15A-606(a), does not amount to a denial of due process and equal protection under either the North Carolina or United States Constitutions. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

Even so, respondent argues he was prejudiced because his counsel was of the belief that the hearing conducted on 30 July 1984 was to determine probable cause and he was not aware until its conclusion that the prosecutor and the court considered the hearing to be adjudicatory. Respondent asserts that had his counsel known that the hearing was an adjudicatory hearing, he would have conducted his representation of respondent in a different manner, i.e., he would have presented evidence and sought to exclude inadmissible evidence, rather than using the hearing for discovery purposes. We reject this argument for the following reasons.

Respondent was taken into custody on 17 July 1984. On 23 July 1984, Judge Read conducted a detention hearing pursuant to G.S. 7A-577, at which both respondent and his counsel were present. At the conclusion of that hearing, Judge Read ordered that respondent remain in the Durham County detention home "until this matter can be heard." In open court he set the case for hearing the following Monday, 30 July, and instructed the clerk to issue subpoenas "for the *hearing on the merit* [sic] for next Mon-

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day as to this felony charge. . . ." Respondent and his counsel were clearly placed on notice that the court intended to proceed with the adjudicatory hearing on 30 July and made no objection to the setting.

On 30 July, the case was called for hearing before Judge LaBarre. Respondent's counsel gave no indication that he was not prepared to proceed or that he had not been furnished with any requested discovery. He cross-examined the State's witnesses and presented a witness on behalf of respondent. At the conclusion of the hearing, Judge LaBarre found that respondent had committed the offense charged and adjudged him delinquent. A dispositional hearing was set for the following Monday, 6 August, before Judge Read. Even though Judge Read had expressly provided that the 30 July hearing was "on the merits," on 2 August respondent's counsel appeared before Judge LaBarre and informed him that counsel had not understood that the 30 July hearing was an adjudicatory hearing and that at the time of that hearing he had not been furnished with a copy of the statement of Rodney Burchett, a co-defendant, who had testified for the State. Judge LaBarre stated that he would strike the adjudication and permit respondent to present additional evidence. After consulting with the witnesses, who were present in court, respondent's counsel advised Judge LaBarre that he did not wish to present additional evidence.

A probable cause hearing is not conducted for the purposes of discovery; its purpose is to determine whether there is probable cause to believe that a crime has been committed and that respondent committed it. *State v. Hudson*, 295 N.C. 427, 245 S.E. 2d 686 (1978). A further purpose of the probable cause hearing prescribed by G.S. 7A-609 is to determine whether the juvenile's case should be transferred to Superior Court for trial as an adult. See G.S. 7A-610. The State did not seek the transfer of this case to Superior Court. The court found beyond a reasonable doubt that respondent had committed the offense charged in the juvenile petition, applying a standard of proof substantially greater than probable cause.

We also reject respondent's argument that he was prejudiced because he had not been provided with a copy of Rodney Burchett's pretrial statement in advance of the 30 July hearing, as had

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been requested through discovery. Respondent's counsel cross-examined Burchett regarding the untruthfulness of his pretrial statement and the conditions of his plea arrangement. Burchett's pretrial statement was substantially more damaging to respondent than was his testimony at the hearing and respondent's counsel wisely limited his cross-examination of Burchett to an admission that he had lied, rather than bringing out the contents of the earlier statement. As the trial judge correctly observed, if respondent had not been provided with the requested statement, he should have requested a delay and sought an order, pursuant to G.S. 7A-618, requiring the State to produce it.

We admonish the trial courts that juveniles should be afforded the protection of each of the procedural safeguards provided by the North Carolina Juvenile Code. However, the burden is upon respondent to show a reasonable possibility that a different result would have been reached at his adjudicatory hearing had he been afforded a probable cause hearing. *See State v. Hudson, supra* (criminal defendant's burden to show a reasonable possibility of a different result at trial if probable cause hearing had been conducted). Under the circumstances of this case, respondent has failed to show prejudice.

[2] In his second assignment of error respondent argues that the trial court erred in denying his motion to dismiss the charge of felonious larceny on the grounds of insufficiency of the evidence. Generally, G.S. 7A-631 confers upon a respondent in a juvenile adjudication hearing "all rights afforded adult offenders" subject to certain exceptions not applicable to this case. These rights include the right "to have the evidence evaluated by the same standards as apply in criminal proceedings against adults." *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E. 2d 904, 906 (1985). Therefore, in order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged. *See State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980).

Evidence presented by the State tended to show that on 17 July 1984 Gilbert Carmack parked his 1981 El Camino truck,

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worth \$7,500, at his place of employment. Rodney Burchett, Rodney Smith, Ricky Smith and respondent were together that morning when either Rodney Burchett or Rodney Smith noticed that the keys had been left in the truck. The four of them made a plan to steal the truck. While respondent and Rodney Smith waited approximately a block away, Rodney Burchett and Ricky Smith took the truck. They then picked up respondent and Rodney Smith. Clayborne Hudson, Carmack's employer, was made aware of the theft of the truck shortly thereafter and, upon locating the vehicle with its four occupants, gave chase, managing to block the road. When the truck became blocked, the occupants jumped out and ran. Hudson recognized respondent as one of the occupants.

The essential elements of larceny under G.S. 14-72 are that the defendant took the property of another; carried it away; without the owner's consent; and with the intent to permanently deprive the owner of his property. *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982). Although Burchett and Ricky Smith actually took the truck, if respondent counseled, advised or encouraged them in the commission of the offense he would be equally guilty of larceny even though he was not actually present at the scene when the offense was committed. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982); G.S. 14-5.2. We find that the evidence, viewed in the light most favorable to the State, was sufficiently substantial to establish that respondent, together with Burchett and the Smiths, planned that Burchett and Ricky Smith would take the truck, without Carmack's consent, and pick up respondent and Rodney Smith who were waiting nearby. A reasonable inference could also be drawn by the trial judge that at the time of the taking respondent and the other participants had the requisite felonious intent to deprive Carmack permanently of his truck. This assignment of error is overruled.

[3] In his final assignment of error respondent argues that the trial judge erred in failing to release him pending appeal without stating, in writing, compelling reasons why he should not be released. G.S. 7A-668 provides:

Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the judge orders otherwise. For compelling rea-

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sons which must be stated in writing, the judge may enter a temporary order affecting the custody or placement of the juvenile as he finds to be in the best interest of the juvenile or the State.

In other words, pending his appeal the juvenile must be released unless the judge enters a written order to the contrary, stating the reasons for commitment pending appeal. In the instant case no such order was entered. This error, however, was in a post trial procedure and could not have prejudiced respondent in the adjudication hearing. Moreover, the commitment order was based at least in part upon the trial court's finding that respondent had violated probation, a finding to which respondent has not excepted and assigned error. Since the finding of violation of probation would support the commitment order, independently of the adjudication of delinquency based upon the larceny charge, respondent has not been prejudiced by the failure of the trial court to enter the required order, or in the alternative, to release respondent pending appeal

Affirmed.

Judges WEBB and BECTON concur.

WILLARD SANDERSON, EMPLOYEE, PLAINTIFF v. NORTHEAST CONSTRUCTION CO., EMPLOYER; UNITED STATES FIDELITY & GUARANTY CO., CARRIER, DEFENDANT

No. 8410IC1144

(Filed 1 October 1985)

1. Master and Servant § 65.2— workers' compensation—back injury—not engaged in routine duties

There was no evidence to support the Industrial Commission's finding that plaintiff was engaged in routine duties in his customary fashion and that plaintiff's back injury was not caused by an accident where plaintiff, a carpenter, injured his back while unloading tile during a time when there was no carpentry work to be done. All of the evidence, including that solicited from witnesses produced by defendant, showed that plaintiff was not performing his routine duties in his customary way when he hurt his back.

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2. Master and Servant § 90— workers' compensation—notice to employer

The Industrial Commission did not err by not finding that plaintiff failed to give timely written notice or by not dismissing plaintiff's claim for not giving timely written notice where plaintiff injured his back on 2 February 1982, plaintiff notified his crew leader two weeks later, it was not clear from the record whether the crew leader repeated to superiors what he was told by plaintiff, but it was clear that defendant knew about the accident within a month of its occurrence because defendant received a doctor's bill in late February or early March and a claims adjuster spoke with plaintiff in March. Defendant was on notice of the injury soon after it occurred, certainly soon enough for a thorough investigation, and could not have been prejudiced by plaintiff's failure to give written notice.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 27 June 1984. Heard in the Court of Appeals on 14 May 1985.

Jeffrey S. Miller for the plaintiff appellant.

Gaylor, Edwards, McGlaughon, Collins and Vatcher by Jimmy F. Gaylor for the defendant appellees.

COZORT, Judge.

Plaintiff filed a claim for workers' compensation for injury to his back which he alleged was caused by an accident at his work place on 2 February 1982. Deputy Commissioner Stephens denied plaintiff's claim on the grounds that plaintiff's testimony concerning a fall was not credible and that the injury occurred while plaintiff was performing "routine duties in his customary fashion." The Full Commission, Commissioner Vance dissenting, upheld the denial of plaintiff's claim. We reverse.

The primary issue for our consideration is whether the injury to the plaintiff occurred as a result of an accident, as contended by the plaintiff, or in the course of plaintiff's performing routine duties in his customary fashion, as contended by his employer. The facts are as follows:

Plaintiff is a carpenter who, at the time of the injury, was employed by Northeast Construction Company. Northeast had a contract to renovate and remodel houses to be used by the military. Plaintiff's primary responsibilities as a carpenter were rough framing, installing two-by-fours, and doing termite damage repair. At the time the injury occurred, Northeast was between

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phases in a project, and there was little carpentry work to be done. During those periods, the carpenters did a variety of odd jobs, whatever needed to be done around the job site. On 2 February 1982, plaintiff was directed by his foreman to move boxes of floor tile from a warehouse to a storage shed. Each box weighed from 50 to 75 pounds. Plaintiff would take a box of tile off a forklift and carry it inside a small tin shed which had a doorway approximately five feet high. Plaintiff testified he had to bend over to get through the doorway. He testified at the hearing that while carrying one of the boxes through the doorway, he tripped over the board which went across the bottom of the doorway and fell, hurting his back. Plaintiff tried to work for two weeks after the injury. With the pain increasing, he reported the injury to one of his co-workers, a crew leader, and left work. Plaintiff initially received conservative treatment from a physician in Kinston. In March, he was admitted to Pitt Memorial Hospital where a neurosurgeon performed a laminectomy to repair a ruptured disc in the lower portion of plaintiff's back.

At the hearing, the insurance carrier produced a claims adjuster who offered a recorded statement taken from plaintiff over the phone when plaintiff was released from the hospital. In the statement plaintiff did not blame his injury on tripping or falling; rather, he stated he "overstrained" his back, that he felt a "pop," a "sharp pain" when he bent over to carry the tile into the building. His statement concluded: "I had to bend down as I entered the building. I could have twisted my back in an abrupt or unusual manner. I wouldn't say about that, I just don't know."

In the Opinion and Award of Deputy Commissioner Stephens, which was affirmed and adopted by the Full Commission, the following findings of fact were made:

7. On 29 March 1982 plaintiff gave a recorded statement to a representative of the defendant insurance carrier. Plaintiff told such representative that he was carrying boxes of tile into the shed "where [he] had to bend over and it just overstrained [him]." Plaintiff responded negatively to several questions as to whether he had slipped or fallen or twisted himself in any unusual manner.

8. At the hearing of this case, plaintiff testified that he experienced the sharp pain in his back when he tripped over

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the doorsill while carrying a box of tile into the shed and fell. Such testimony is not accepted by the undersigned as credible.

9. Plaintiff's regular job duties included doing any odd jobs around the construction site which had to be done. There is no evidence in this record that carrying boxes of tile, or other materials of a similar weight, into the storage shed in the manner in which plaintiff carried these boxes was an unusual task for him to perform. Likewise, there is no evidence that the conditions and circumstances of his employment on 2 February 1982 were different and, thus, likely to result in unexpected consequences. The greater weight of the evidence is that plaintiff was performing routine duties in his customary fashion and that he suffered an injury to his back while doing so.

From these and other findings the Commission concluded: "The injury to plaintiff's back on 2 February 1982 was not caused by an accident arising out of and in the course of his employment Thus, he is not entitled to the benefits of the Workers' Compensation Act."

On appeal plaintiff argues that the Full Commission erred in finding as fact that plaintiff was "performing routine duties in his customary fashion" and concluding therefrom that the back injury was not caused by an accident. Plaintiff points out that he was employed as a carpenter, and carrying boxes of tile is not the "routine duty" of a carpenter. In addition, plaintiff submits that to bend over to get through a low door while carrying a fifty-pound box of tile qualifies as performing a task in an unusually cramped or awkward position which with the injury constitutes a compensable accident under G.S. 97-2(6). Defendants respond that the evidence shows that on this particular job site it was customary for carpenters to do odd jobs when there was no carpentry work to be done. They contend that the findings of the Commission fully support a conclusion that the back injury was not caused by accident.

When reviewing appeals from the Industrial Commission, the Court is limited in its inquiry to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's find-

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ings of fact justify its legal conclusions and decision. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The Commission's findings of fact are conclusive on appeal if supported by competent evidence. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981). This is so even if there is evidence which would support a finding to the contrary. *Id.* "In deciding whether there was an accident, the only question on appeal is whether there was 'an unlooked for and untoward event' or 'the interruption of the routine work and the introduction thereby of unusual conditions.' [Citations omitted.]" *Ross v. Young Supply Co.*, 71 N.C. App. 532, 535, 322 S.E. 2d 648, 651 (1984).

[1] With these rules in mind we turn to the question of whether any competent evidence supported the finding of the Commission that plaintiff was engaged in "routine duties in his customary fashion" when he suffered the injury to his back, thus supporting the Commission's conclusion that the "injury to plaintiff's back on 2 February 1982 was not caused by an accident," barring his entitlement to benefits under the Workers' Compensation Act. Our review of the record compels our holding that there is no evidence to support the Commission's finding that plaintiff was engaged in "routine duties in his customary fashion." Instead, all the evidence, including that solicited from witnesses produced by Northeast, shows that plaintiff was *not* performing his routine duties in his customary way when he hurt his back.

The plaintiff's evidence on his duties and responsibilities is not very helpful. He did not describe his normal duties as a carpenter. His only testimony on this issue was that he "wouldn't have thought that unloading tile was my normal duty at Northeast Construction but I done it anyway." The remaining witnesses for the plaintiff gave no testimony about plaintiff's duties.

Northeast produced three witnesses who testified about plaintiff's job duties and the responsibilities of carpenters for Northeast, especially the duty to unload tile. Timothy Hiehle, a Vice President and project manager for Northeast, testified:

Mr. Sanderson was a carpenter with our company. As a carpenter with our company, Mr. Sanderson was primarily responsible for rough framing, installing two-by-fours, doing termite damage repair.

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* * * *

Mr. Sanderson possibly had been laid off for a few days prior to January. It was a time there where we had our carpenters doing laborer's work. It is not unheard of for a carpenter to do a laborer's work on that job.

* * * *

In February tile was being installed somewhere. It was normally the case once the tile was put into the shed it would have stayed there for a while, it would remain there. We would not have consistently, every day, put tile into that little shed for a whole month. I would agree that Willard Sanderson didn't move any tile in January. I would agree he normally didn't move tile.

Edwin C. Kerr is the crew leader to whom plaintiff reported his injury. He normally worked with plaintiff and did work with plaintiff the day plaintiff was injured. He testified:

We worked in the same unit doing probably the same work.

I never stacked any tile. Sometimes I moved tile. Not full boxes. I go get a little bit of tile here and there. The carpenters did not normally move and stack tile. . . .

We all had periods of time when we didn't have any carpentry work to do.

* * * *

In situations when we didn't have anything to do, we would mess around the warehouse, painting tools here and there. . . .

Stephen Stout, a carpenter for Northeast, gave contradictory testimony on the responsibility of unloading tile. He first testified: "To my knowledge I do not recall ever having unloaded tile or being assisted by Mr. Sanderson in unloading tile at Northeast Construction. I don't recall ever having seen him unloading tile around the warehouse or shed there. It somewhat refreshes my memory that it has been testified to that four people unloaded tile on that date. I was not assisting my four people on that day unloading tile." He later testified: "I don't know whether it was the 2nd or not, most of the time we demolish asbestos. We did not

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move tile." And finally, "I am a carpenter. I was moving tile because I was driving a forklift. I drove it most of the time. . . . As far as I know on February 2, there were three people helping me unload tile."

This evidence requires us to find that plaintiff was not engaged in his routine duties in his customary fashion. There is no evidence to support the Commission's finding that he was, and we so hold.

[2] On appeal, Northeast contends the plaintiff's claim should have been dismissed for failure to comply with G.S. 97-22. That statute requires an injured employee to give to his employer written notice of the accident as soon thereafter as practicable and provides that "no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." Northeast argues that plaintiff's failure to give immediate written notice "made it difficult, if not impossible, for a full reconstruction of the events" because "the company was forced to attempt a reconstruction at a much later date." The record does not support this contention. It is not clear from the record whether crew leader Kerr repeated to any superiors what he was told by plaintiff two weeks after plaintiff's injury. However, it is clear from the record that Northeast knew about the accident within a month of its occurrence. Northeast Vice President Hiehle testified that he learned of plaintiff's claim when the company received a doctor's bill "in late February or early March of 1982." A claims adjuster for Northeast's insurance carrier spoke with plaintiff by phone in March soon after plaintiff was released from the hospital. The record shows Northeast was on notice of the injury to plaintiff soon after it occurred, certainly soon enough for a thorough investigation. Northeast could not have been prejudiced by plaintiff's failure to give written notice. Thus, there was no error in the Commission's not finding the plaintiff failed to give timely written notice or in its not dismissing plaintiff's claim for not giving timely written notice.

The Industrial Commission's Opinion and Award denying plaintiff's claim is reversed and the cause is remanded to the Commission for entry of an appropriate award.

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Reversed and remanded.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. JAMES BENJAMIN WATTS

No. 8422SC1342

(Filed 1 October 1985)

1. Criminal Law § 102— opening and closing arguments not recorded—no prejudice

There was no prejudice in a prosecution for possessing, manufacturing and trafficking in marijuana and methaqualone where the court reporter failed to record the opening and closing arguments of counsel because the only assignment of error relating to the oral argument involved the failure to record the argument and the district attorney's comment on defendant's refusal to answer a question on cross-examination concerning another arrest for possession of marijuana. The jury had witnessed the cross-examination and there was not a reasonable possibility that a different result would have been reached at trial without the comment. Rule 608 of the North Carolina Rules of Evidence.

2. Criminal Law § 102— cross-examination—defendant required to introduce evidence—right to open and close argument—lost by introduction of other evidence

The trial court did not err in a prosecution for possessing, manufacturing and trafficking in marijuana and methaqualone by requiring defendant to place into evidence certain photographs in order to use them for illustrative purposes during cross-examination of a State's witness. The introduction of the photographs did not deprive defendant of the right to the opening and closing argument because he introduced his own evidence, including three witnesses. Rule 10 of the General Rules of Practice for the Superior and District Courts.

3. Criminal Law § 86.5— cross-examination of defendant—arrest for another offense—defendant opened door

There was no error in a prosecution for possessing, manufacturing, and trafficking in marijuana and methaqualone where the court allowed the district attorney to bring to the attention of the jury that defendant had been arrested for possession of marijuana after the offenses for which he was being tried, despite an agreement that the arrest would not be raised, where defendant opened the door by testifying in his own behalf that his only other charge was a traffic ticket.

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4. Criminal Law § 128.2— prosecutor asking forbidden question—mistrial denied—no error

The trial judge did not abuse his discretion in a prosecution for possessing, manufacturing, and trafficking in marijuana and methaqualone by denying defendant's motion for a mistrial where the district attorney asked defendant on cross-examination whether he owned any weapon even though the judge had earlier instructed the State not to question defendant concerning his ownership of the weapon on the date of his second arrest. Defendant's objection to questioning was sustained and the jury was instructed to disregard the question.

5. Criminal Law § 88.1— exculpatory statements of defendant—excluded on cross-examination of State's witnesses—no prejudice

There was no prejudice in a prosecution for possessing, trafficking, and manufacturing marijuana and methaqualone from the court's refusal to permit defendant to elicit during cross-examination of several State's witnesses exculpatory statements made by defendant where those matters were introduced during defendant's own testimony.

6. Criminal Law § 84— introduction of consent to search form—probative to show control of premises—no error

The trial court did not err in a prosecution for possessing, trafficking, and manufacturing marijuana and methaqualone by allowing the introduction of a signed consent to search form where the form had probative value in that it tended to show that defendant exercised control over the buildings in question.

7. Criminal Law § 50— testimony of SBI agents—experts—no error

The trial court did not err in a prosecution for possessing, manufacturing, and trafficking in marijuana and methaqualone by allowing two SBI agents to testify as experts where the record revealed that both agents were properly qualified.

8. Narcotics § 3.1— trafficking in marijuana—240 pounds of marijuana on courtroom floor—admissible as illustrative evidence

The trial court did not err in a prosecution for possessing, manufacturing, and trafficking in marijuana and methaqualone by allowing the State to pile 240 pounds of marijuana on the courtroom floor where the evidence tended to show that defendant did in fact possess a large quantity of marijuana and it was proper for the State to bring in a large quantity of marijuana as illustrative evidence.

APPEAL by defendant from *Davis (James C.)*, Judge. Judgments entered 30 August 1984 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 16 September 1985.

Defendant was charged in proper bills of indictment with illegal manufacture of marijuana; illegal possession of marijuana with intent to manufacture, sell or deliver; trafficking in mari-

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juana; and illegal possession of methaqualone with intent to manufacture. Defendant was first tried on these charges in June 1984. At the close of the State's evidence the court granted defendant's motion to require the State to proceed on only one of the three marijuana offenses. The State elected to proceed on the trafficking charge and the court dismissed the manufacturing and possession of marijuana charges. The jury was unable to reach a unanimous verdict, and a mistrial was declared on 27 June 1984. This appeal stems from defendant's second trial which began on 27 August 1984. At the second trial the State introduced evidence which tends to establish the following:

On 4 October 1983 a State Bureau of Investigation (SBI) airplane flew over northwestern Alexander County as part of a marijuana eradication program. The pilot spotted three fields of marijuana and directed ground units to those fields. The main entrance road was barred with a locked chain, but officers were able to reach the fields from a logging trail that ran past two outbuildings owned by Mr. Watts and led to the rear of his residence.

When Mr. Watts was informed that marijuana had been seen growing on his property he orally gave permission to the officers to search the fields. Officers found a tractor loaded with recently harvested marijuana near one of the fields. A pile of recently burned marijuana stalks was found behind one of the outbuildings. Mr. Watts also signed a consent to search form allowing the officers to search the outbuildings. One of these buildings had to be unlocked with a key obtained from Mr. Watts. One of the buildings contained drying racks, electric fans, shears, and other items used to process and package marijuana, as well as a large quantity of dried marijuana packed in burlap bags. The total weight of the marijuana found on the property was in excess of 5,000 pounds. The other building contained various chemicals used in the manufacture of methaqualone, a Schedule One controlled substance. Mr. Watts was arrested for the various violations of the controlled substances act noted above.

Defendant introduced his own evidence which tends to show that he had leased the two outbuildings and had no knowledge of their contents. He also claimed to have no knowledge of the three fields of marijuana and said he had never seen the tractor before. Defendant was convicted of trafficking in marijuana and posses-

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sion with the intent to manufacture methaqualone. From a judgment imposing the presumptive sentences of 14 and 3 years, respectively, and requiring defendant to pay fines totaling \$320,000, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Catherine McLamb, for the State.

Jason R. Parker for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to the court reporter's failure to record the opening and closing arguments of counsel. Recordation of trial proceedings is governed by G.S. 15A-1241 which provides in relevant part that "[t]he motion for recordation of jury arguments must be made before the commencement of any argument. . . ." In the present case defendant made a pre-trial motion "for complete recordation of all proceedings." This motion was allowed in an order entered 25 January 1984. The court reporter did not record the jury arguments and defendant now contends this is prejudicial error.

Assuming *arguendo* that the trial court erred in not having the jury arguments recorded, we do not perceive any possible prejudice to defendant in this regard. G.S. 15A-1443 places upon the defendant the burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." Defendant has not met this burden. The only assignment of error relating to the oral argument properly brought forward by defendant is his contention that 1) it was error for the court reporter to fail to record the arguments since this precluded effective appellate review, and 2) the court erred in allowing the district attorney to comment on defendant's refusal to answer a question on cross examination relating to his arrest for possession of marijuana in February 1984. The jury had witnessed the district attorney question defendant about this matter and had heard defendant invoke the fifth amendment privilege against self incrimination. Further, even assuming that the district attorney's remarks constituted a violation of Rule 608 of the North Carolina Rules of Evidence, we are not convinced that, had the district attorney not made this comment, there would have been "a reason-

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able possibility that . . . a different result would have been reached at the trial." This assignment of error is without merit.

[2] Defendant also assigns error to a ruling by the court which required defendant to place into evidence certain photographs in order to use them for illustrative purposes during cross examination of a witness for the State. Defendant claims that this ruling was prejudicial "since he lost the right to opening and closing argument by being required to introduce those photographs into evidence. . . ." This contention is without merit. Even if the photographs had not been introduced into evidence, defendant would not have had the right to opening and closing argument before the jury. Rule 10 of the General Rules of Practice for the Superior and District Courts gives defendant this right only when he introduces no evidence. In the present case defendant introduced his own evidence, including the testimony of three witnesses. It was this evidence which cost defendant the opening and closing arguments. This assignment of error is without merit.

[3] Defendant also assigns error to the court's "allowing the district attorney to bring to the attention of the jury the fact that the defendant had been arrested and charged with possession of marijuana on another occasion. . . ." Counsel apparently had an agreement based upon defendant's motion in limine that the district attorney would not raise or discuss this arrest which occurred some four months after the offenses for which defendant was being tried. This arrangement was respected by the district attorney. The subsequent offense was not raised during the State's evidence. But when defendant took the stand to testify in his own behalf he testified that "[t]raffic ticket, that's the only thing I've ever been convicted of. The only thing I've ever been charged with except this." This latter remark was a manifest untruth. By falsely stating his arrest record, defendant opened the door and relieved the State of any obligation not to pursue this matter. The record reveals that the judge admonished the district attorney to limit his cross examination in this matter to questions necessary "to straighten out the record. . . ." As the record shows that the district attorney's questioning on this matter was within the permissible limits, this assignment of error is without merit.

[4] Defendant also assigns error to the court's refusal to grant his motion for mistrial "due to the prosecutor's misconduct while

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cross-examining the defendant concerning his second arrest." Defendant's motion for mistrial was made when the district attorney asked defendant "Mr. Watts, do you own any weapon?" The trial judge had earlier told the district attorney not to question defendant concerning his ownership of a weapon on the date of his second arrest. Defendant's objection to this question was properly sustained, and the court instructed the jury to disregard the question. Defendant contends, however, that the mere asking of this question so prejudiced defendant that a mistrial should have been declared. We disagree. Our Supreme Court has held that "[a] motion for mistrial in a case less than capital is addressed to the trial judge's sound discretion and his ruling thereon is not reviewable without a showing of gross abuse." *State v. Yancey*, 291 N.C. 656, 664, 231 S.E. 2d 637, 642 (1977). Defendant has failed to show any abuse of discretion by the trial judge. This assignment of error is without merit.

[5] Defendant's Assignments of Error Nos. 2-8, 10-11, and 13-18, based on Exceptions Nos. 2-6, 23-24, 29-30, 32-33, 40-71, 73-79, and 83-84, all relate to the admission and exclusion of evidence. Based on Exceptions Nos. 2, 4, 29, 30, 71, 83, and 84 defendant contends that the trial court erred in refusing to allow defendant to elicit, during cross examination of several of the State's witnesses, exculpatory statements allegedly made by defendant to those witnesses. We see no prejudice in the rulings of the court inasmuch as the matters sought to be introduced were in fact admitted into evidence during defendant's own testimony. This assignment of error is without merit.

[6] Based on Exception No. 5 defendant contends that it was prejudicial error for the court to allow the introduction of the signed consent to search form. While the effect of this evidence may have been prejudicial to defendant, we are unable to say that the court committed error. It is an established principle that a valid assignment of error must show both prejudice and error. *State v. Milby and State v. Boyd*, 302 N.C. 137, 273 S.E. 2d 716 (1981). For example, eyewitness testimony that a defendant had committed an armed robbery would be prejudicial to the defendant, but it would not be error for a court to admit it. In the present case the consent to search form had probative value because it tended to show defendant exercised control over the buildings

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in question. As such its admission was not error. This assignment of error is without merit.

[7] Based on Exceptions Nos. 6, 23-24, 32, and 40-45, defendant assigns error to the testimony of two SBI special agents on the grounds that they were allowed to testify as expert witnesses when they were in fact not so qualified. Suffice it to say the record reveals that both agents were properly qualified as experts, and that the court committed no prejudicial error in allowing them to testify as expert witnesses.

[8] Based on Exceptions Nos. 26 and 31 defendant contends that it was error for the court to allow the State to pile 240 pounds of marijuana on the courtroom floor. Defendant claims that this is "analogous to allowing the State to bring in a decaying corpse in a murder trial." Defendant was charged with trafficking in marijuana, and the evidence tends to show that defendant did in fact possess a large quantity of that controlled substance. Therefore, it was proper for the State to bring in a large quantity of marijuana as illustrative evidence of the offense. We do not believe that the presence of 240 pounds of marijuana could possibly have the same effect on a jury as the presence of "a decaying corpse." We are unable to find prejudicial error resulting from this incident.

We have examined each of the remaining assignments of error in detail and conclude that they are equally without merit.

No error.

Judges ARNOLD and COZORT concur.

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FIRST AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION v. W. RICHARD ROYALL, C. BRANTLEY TILLMAN AND JOHN W. WINTERS, PARTNERS TRADING AS FALLS NORTH ASSOCIATES

No. 8410SC1268

(Filed 1 October 1985)

Deeds § 24— failure to construct water line—violation of covenant against encumbrances

Summary judgment was properly entered for plaintiff in an action arising from the sale of a subdivision lot to plaintiff by defendant developers where defendants violated the covenant against encumbrances in both the option contract and the warranty deed by failing to construct a water line required by the City for a certificate of occupancy. The City had the authority to withhold issuance of a final certificate of compliance allowing occupancy pending completion of the water line, it was the obligation of defendants to install the water line, and the requirement that a water line be constructed before a grantee may occupy property fits the definition of an encumbrance. G.S. 1A-1, Rule 56, G.S. 160A-411 (1982), G.S. 160A-423 (1982).

APPEAL by defendants from *Barnette, Judge*. Judgment entered 11 July 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 5 June 1985.

Merriman, Nicholls, Crampton, Dombalis & Aldridge, P.A., by William W. Merriman, III, and W. Sidney Aldridge, for plaintiff appellee.

Brown & Campbell, by C. K. Brown, Jr., for defendant appellants.

BECTON, Judge.

I

Plaintiff, First American Federal Savings & Loan Association (First American), filed this action against defendants, Richard Royall, Brantley Tillman, and John Winters (developers), seeking recovery based on breach of the covenant against encumbrances, misrepresentation and breach of contract for failure to install a certain water line as promised by developers to the City of Raleigh (City). The developers answered, admitting that they had conveyed the property in question to First American, but denying that they had agreed to install the water line. First American moved for summary judgment. The motion was granted, and the

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trial judge awarded First American \$12,568.63, the alleged cost of having the water line installed, plus interest.

Defendant developers appeal, contending that there were genuine issues of fact concerning the obligation and responsibility of the developers for installing the water line required by the City, and that therefore First American was not entitled to judgment as a matter of law for the cost of constructing the water line. For the reasons set forth below, we conclude that the trial court properly entered summary judgment, and we affirm.

II

The following facts are undisputed. Sometime prior to January 1979, defendant developers acquired a 6.75 acre tract of land in Raleigh, North Carolina, which they proposed to subdivide into nine lots. The developers apparently undertook to develop the property; the evidence shows that they installed a sidewalk. On or about 27 July 1979, developers and First American entered into an option contract to purchase lot one of the subdivision. The contract provided, *inter alia*, that the developers would provide "water and sewer . . . to the subject site." It also provided that developers would convey to First American, by warranty deed, a title "free and clear of all encumbrances."

Prior to 6 November 1979, the developers applied for subdivision approval from the City of Raleigh for a development to be called North Plaza Office Park. At the Raleigh City Council meeting of 6 November 1979, the subdivision plan was presented to the City Council for approval. The City Council minutes pertaining to the plan state, in part, "the developer shall install the water system within the project in conformance with City Standards and Policies, including extension of a 12-inch water line in Falls of the Neuse Road approximately 950 feet to connect with the existing 24-inch line in Bland Road." These minutes also reflect that the subdivision plan was then approved by the Council. On 1 February 1980, the sale was closed, and developers delivered to First American a general warranty deed providing that "title is marketable and free and clear of all encumbrances."

At this point, a conflict in the evidence arises. First American contends that at the closing its attorney asked developers' attorney and one of the developers for assurances that, besides the

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installation of the sewer, which the developers had agreed to complete, there would be no additional or further assessments, liens or obligations to the City for water and sewer. First American contends such assurances were given; the developers deny this. First American then undertook to construct an office building and a savings and loan branch on lot one. It contends that in constructing the building it connected to an existing water line running down Bland Road. However, after construction was completed, First American was advised by the City that a certificate of occupancy would not be issued until a 12-inch water line was constructed to connect to an existing 12-inch line at an adjacent shopping center and a 24-inch line on Bland Road. First American then made demand upon the developers to install the water line, maintaining that the developers had entered into an agreement with the City to do so. Developers refused, stating that the option contract with First American only required them to provide water to the subject site and that they had done so. First American thereupon had the water line installed in order to obtain a certificate of occupancy, and they sued the developers for the cost of installation.

III

The oft-repeated test to determine whether a moving party is entitled to summary judgment is whether, on the basis of the materials presented to the court, there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, Rule 56 (1983). The developers' primary contention is that a disputed question of material fact exists concerning their obligation to extend the water line. We conclude, however, that this issue is resolved as a matter of law.

One condition of the option contract with First American was that water and sewer were to be provided to the subject site. The developers contend that they complied fully with this contractual provision and that the evidence shows water was available to lot one. Indeed, First American does not dispute this. The heart of the developers' position is that there is a dispute regarding whether the developers represented that there would be no further obligation regarding water service on First American's part. First American concedes that the facts are disputed on this point.

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First American argues that this factual dispute is non-material; that is, it does not affect the outcome of the case. See *NCNB v. Gillespie*, 291 N.C. 303, 310, 230 S.E. 2d 375, 379 (1976); *Kessing v. Nat'l Mtg. Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971) (immaterial question of fact does not preclude summary judgment). Specifically, First American's position is that the sale of the land by the developers with the outstanding requirement to construct a 12-inch water line was, as a matter of law, a breach of the covenant against encumbrances contained in both the option contract and the deed from developers to First American.

N.C. Gen. Stat. Sec. 160A-411 (1982) authorizes cities in North Carolina to create inspection departments to perform the duties listed in N.C. Gen. Stat. Sec. 160A-412 (1982), including enforcing state and local laws relating to the construction of buildings, installation of facilities, and maintenance of buildings. N.C. Gen. Stat. Sec. 160A-423 (1982) provides, *inter alia*, no completed building shall be occupied until a certificate of compliance is issued pursuant to a final inspection stating that the structure complies with all applicable State and local laws. See also Raleigh, N.C., Code, Sec. 10-6024 (1984) (detailing inspection procedures). The Raleigh, N.C. Code, Sec. 8-2004 (1985) provides:

All water and sewer connections in new subdivisions shall be the responsibility of the developer and at his expense in accordance with city standards and specifications.

Section 10-3054(a) (1985) of the Raleigh Code provides:

When a subdivision is within the corporate limits of the city, the subdivider shall connect with the water system of the city in accordance with this Code so as to provide water service to every lot within the subdivision.

Turning to the undisputed facts of this case, we first find that the extension of the existing water line was not necessary to provide water service to lot one, but it would be required in order to provide water to several other lots within the subdivision. The excerpt from the minutes of the 6 November 1979 Raleigh City Council meeting shows that the developers represented to the Council that they would complete this extension of the water line between Falls of the Neuse Road and Bland Road. The record also contains a letter dated 16 February 1982

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from Raleigh's Assistant Public Utilities Director to First American. The letter states that the approved subdivision plan for North Plaza Office Park called for the extension of the water main to tie into Bland Road, and until the water line were so extended, a final certificate of occupancy for the savings and loan building would not be issued.

The above-cited provisions of the Raleigh City Code and of our General Statutes make it clear that the City had the authority to withhold the issuance of a final certificate of compliance allowing occupancy of the building pending completion of the water line. The cited law makes it equally clear that it was the obligation of the defendants alone, as the subdividers and developers of the land, to install the water line. This duty, imposed upon the developers by law, was reinforced by their promises to the Raleigh City Council.

The final question, then, is whether this outstanding obligation to the City constituted a violation of the covenant against encumbrances contained both in the option contract and in the warranty deed. We answer this question affirmatively.

By the covenant against encumbrances a grantor of land gives to his grantee security against any outstanding right to, or interest in, the land granted which may subsist in third persons to the diminution of value of the estate conveyed, although consistent with the passing of the fee. An encumbrance, within the meaning of such a covenant, is any burden or charge on the land and includes any right existing in another whereby the use of the land by the owner is restricted.

Gerdes v. Shew, 4 N.C. App. 144, 148, 166 S.E. 2d 519, 522 (1969) (citation omitted); accord *Abernathy v. Stowe*, 92 N.C. 213 (1885) (encumbrances have some foundation in right, such as would require an expenditure of money to remove them).

Although we have discovered no North Carolina cases on this particular point, we have no trouble fitting the requirement that a water line be constructed before a grantee may occupy property into the definition of an encumbrance. See *Coble v. Dick*, 194 N.C. 732, 140 S.E. 2d 745 (1927) (an assessment for street improvements is a lien, according to Gen. Stat. Sec. 2713 (now part

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of N.C. Gen. Stat. Sec. 160A-228 (1982)), and this constitutes an encumbrance upon the land; the covenant against encumbrances in warranty clause of deed was broken upon delivery of deed to plaintiff, and plaintiff had immediate cause of action for breach); *see also City of Winston-Salem v. Powell Paving Co.*, 7 F. Supp. 424 (M.D.N.C. 1934), *modified on other grounds, United States v. City of Greenville*, 118 F. 2d 963, 966 (4th Cir. 1941). *See generally* Webster's Real Estate Law in North Carolina, Sec. 217 (Hetrick rev. ed. 1981) (containing examples of encumbrances).

Therefore, we conclude that on the undisputed facts of this case, the defendant developers were legally obligated to install the water line in question, and their failure to do so constituted a violation of the covenant against encumbrances. Whether the developers made additional representations to First American that the latter would incur no further expenses with respect to water service to the property is irrelevant to the resolution of this case. As First American is entitled to judgment on the undisputed facts, no issue remains to be tried. Summary judgment was proper.

Affirmed.

Judges PHILLIPS and EAGLES concur.

STATE OF NORTH CAROLINA v. SAMUEL LAWRENCE WILLIAMS

No. 8310SC642

(Filed 1 October 1985)

1. Indictment and Warrant § 5— notice of return of indictment mailed to wrong address—no prejudice

The trial court did not err in a prosecution for robbery with a dangerous weapon by denying defendant's motion to dismiss for lack of jurisdiction and his alternative motion for a continuance to clear up jurisdictional questions where notice of the return of the bill of indictment was mailed to the wrong address. There is nothing in G.S. 15A-630 to indicate that the mailing of the return of indictment is jurisdictional and, while the record is unclear as to when counsel was obtained by defendant, defendant was represented by counsel approximately two weeks after notice of indictment was mailed and had ample time for discovery.

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2. Criminal Law § 62— polygraph test—admissible

The trial court did not err by admitting the results of a polygraph examination and the polygraphist's accompanying testimony in a case tried before *State v. Grier*, 307 N.C. 628, where the provisions of the stipulation allowing the introduction of the test were complied with in that defendant's counsel was present at the polygraph examination and was given the opportunity to present materials to the examiner, and there was no prejudice from the failure to provide defendant with the results of a first test in writing because he was orally advised that he had failed the first test, demanded a second test pursuant to the terms of the stipulation, and the results of the second test were released to defendant both orally and in writing. Alleged procedural defects in the test were pointed out during defendant's examination of the polygraphist, and the court did not abuse its discretion in ruling the results admissible.

3. Criminal Law § 66.9— armed robbery—photographic identification—no error

In a prosecution for the robbery of an A & P with a dangerous weapon, the pretrial photographic procedures from which the store manager identified defendant were not unduly suggestive and conducive to a likelihood of irreparable misidentification where defendant was the only person to have photographs in both arrays shown to the witness, the background of the photograph of defendant in the second array, which the witness selected, was different from the backgrounds of the other photographs, and a police officer remarked prior to the showing of the second array that he thought the robber's picture was in that array. The store manager observed the robber for five or six seconds from a distance of twelve to fifteen feet before the robber put a bandana over his face, the store manager observed the robber for twelve to fifteen minutes with the bandana over the robber's face, the manager selected a photo of defendant from the first array as the photograph which most closely resembled the robber but thought the person's complexion was too light, and selected a more recent photograph of defendant immediately upon being shown the second photographic array. The store manager also testified that his in-court identification was based upon his seeing defendant in the store.

4. Criminal Law § 175.2— armed robbery—denial of recess to locate witness—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for robbery with a dangerous weapon by denying defendant's motion for a recess to enable him to locate a witness where defendant sought to introduce the testimony of a police officer to show that the descriptions of the robber initially given by the eyewitnesses differed greatly from the descriptions given later by them, defendant did not subpoena this witness prior to trial, and defendant had the opportunity to cross-examine the eyewitnesses as to any inconsistent statements they may have made.

APPEAL by defendant from *Bowen, Judge*. Judgment entered 19 January 1983 in Superior Court, WAKE County. Originally heard in the Court of Appeals 16 January 1984.

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Defendant was tried on a bill of indictment charging him with robbery with a dangerous weapon. The State's evidence tended to show that the A & P Grocery store on Hillsborough Street in Raleigh, North Carolina was robbed by an individual armed with a small handgun. The store manager identified this individual as defendant both in court and out of court from a photograph line-up. Defendant was found guilty as charged. From a judgment imposing an active sentence, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Duncan A. McMillan, for defendant appellant.

JOHNSON, Judge.

This case is back before us on remand from the Supreme Court with directions to address issues not considered in our previous opinion, in which the majority of the panel awarded a new trial by prospectively applying the rule of *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), that polygraph evidence, even when parties have stipulated to its admissibility, is inadmissible. See *State v. Williams*, 66 N.C. App. 374, 311 S.E. 2d 375 (1984). The Supreme Court reversed, holding that the *Grier* rule was limited in its application to the *Grier* case and to those trials commencing on or after the certification of the *Grier* opinion. Since defendant's trial concluded before the *Grier* opinion was ever filed, the *Grier* rule did not apply. See *State v. Williams*, 311 N.C. 395, 317 S.E. 2d 396 (1984). We now consider the appeal on the merits.

[1] By his first and fifth assignments of error, defendant contends the court erred in denying his motion to dismiss the action for lack of jurisdiction and in denying his alternative motion to continue to clear up "jurisdictional questions." Defendant argues the court did not have jurisdiction over him because he never received notice of return of the bill of indictment as required by G.S. 15A-630. The record shows that the notice of return of bill of indictment mailed to defendant at 1401 B-1 Stovall Drive, Raleigh, North Carolina was returned by the United States Postal Service. Defendant's address was 1404 B-1 Stovall Drive, Raleigh, North Carolina, where he was served with the warrant. G.S. 15A-630 requires the presiding judge to cause notice of the indictment to be

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mailed or otherwise given to the defendant unless he is then represented by counsel. There is nothing in G.S. 15A-630 to indicate that the mailing of the return of indictment is jurisdictional. Indeed, the Official Commentary to G.S. 15A-630 indicates that the statute was enacted simply to establish a starting point for beginning the running of the period for discovery. Moreover, notice need not be mailed to defendant if he is represented by counsel. The record is unclear as to when counsel was obtained by defendant. The record is clear, however, that defendant was represented by counsel on 17 September 1982, approximately two weeks after notice of indictment was mailed on 2 September 1982, well before his trial began on 17 January 1983. Defendant thus had ample time for discovery. Defendant has shown no prejudice. These assignments of error are overruled.

[2] By his second and eighth assignments of error, defendant contends the court erred in admitting the results of the polygraph examination and the polygraphist's accompanying testimony. Since *State v. Grier, supra*, does not have retroactive application, these questions must be decided by the law in effect prior to the opinion in *State v. Grier*. These principles are as follows: Polygraph evidence is not admissible in the absence of a valid stipulation executed by the parties permitting its admission. *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979). The provisions of the stipulation must be strictly complied with. *State v. Meadows*, 306 N.C. 683, 295 S.E. 2d 394 (1982). If the graphs and the examiner's opinion are offered, the opposing party must be given the opportunity to cross-examine the examiner regarding the examiner's qualifications and training, the conditions under which the test was given, and the limitations and possibilities of error of polygraph examinations. *State v. Steele*, 27 N.C. App. 496, 219 S.E. 2d 540 (1975). Notwithstanding the stipulation as to admissibility, the admissibility of the test results is within the discretion of the trial judge, who may choose to exclude the evidence because of dissatisfaction with the qualifications of the examiner or with the conditions under which the test was conducted. *Id.*

Defendant presents a two prong argument against the admissibility of the results in the present case. He first argues the terms of the stipulation were not complied with in two respects: (1) his counsel was not given the opportunity to provide reports

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and statements to assist the examiner in formulating questions as required by the terms of the stipulation; and (2) defendant's counsel was not given a written report of the results as required by the terms of the stipulation. Defendant presented these identical objections to the trial court. Under questioning by the court, defendant's counsel conceded that he was present at the polygraph examination and was given the opportunity to present questions for the examiner to ask and that he was never told that he could not present materials to the examiner. The examiner testified that he formulated his questions from information given him by defendant and a Raleigh police detective. We hold the former condition was complied with. As for the provision of a written report, the stipulation provided that the results of the examination were to be released to the State's and defendant's counsel orally and in writing. Defendant was given two polygraph tests. When he was orally advised that he had failed the first test, he demanded a second test pursuant to the terms of the stipulation. The results of the second examination were released to defendant both orally and in writing. Although the results of the first test were not released to defendant in writing, defendant has shown no prejudice. We hold the terms of the stipulation were sufficiently complied with.

Defendant also argues, by pointing out alleged defects in the procedures used, that the test results were inadmissible and that there was an insufficient basis to support the court's findings. Defendant pointed out these alleged deficiencies during his examination of the polygraphist. The court heard this testimony and in its discretion ruled the results were reliable and admissible. We have carefully reviewed the record and find there was no abuse of discretion. There was ample evidence to support the court's finding.

[3] By his third assignment of error, defendant contends that the court erred in admitting the store manager's in-court identification testimony because the pretrial photographic procedures were unduly suggestive, and conducive to a likelihood of irreparable misidentification. In addressing this assignment of error, we must employ a two step process. First, we must determine whether an impermissibly suggestive procedure was used. If so, we must then determine whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likeli-

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hood of irreparable misidentification. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). The test we must apply is whether the pretrial procedure was so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice. *Id.*

Defendant argues that the pretrial procedure used was unduly suggestive because (1) defendant was the only one to have a photograph in both arrays of photographs shown to the State's identification witness; (2) the background in the photograph of defendant in the second array, which the witness selected as being the robber, was different from the backgrounds of the other photographs; and (3) prior to showing the witness the second array, a police officer remarked that he thought the robber's picture was in that array. None of these, standing alone, however, are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. See, e.g., *State v. Leggett*, *supra* (photographs of defendant were only common photographs); *State v. Conyers*, 33 N.C. App. 654, 236 S.E. 2d 393, *app. dismissed*, 293 N.C. 362, 238 S.E. 2d 150 (1977) (photograph of defendant had distinctive border); *United States v. Lincoln*, 494 F. 2d 833 (9th Cir. 1974) (defendant's photograph only one in color); *State v. Davis*, 297 N.C. 566, 256 S.E. 2d 184 (1979) (police statement that picture of suspect in array). Nor do we believe these factors, taken together, were so unduly suggestive as to give rise to a substantial likelihood of irreparable misidentification under the totality of circumstances in this case. The store manager testified on voir dire that he observed the robber for five or six seconds from a distance of twelve to fifteen feet before the robber put a bandana over his face. He also observed him for twelve to fifteen minutes with the bandana over the robber's face. From the first photographic array, he selected a photo, one of the defendant, which most closely resembled the robber, but he thought the person's complexion was too light. When shown the second photographic array, which included a more recent photograph of defendant, he immediately selected the photograph of defendant as being the robber. The store manager also testified that his in-court identification of defendant was based upon his seeing the defendant in the store that evening.

By his fifth assignment of error, defendant contends the court erred in denying his motion to dismiss for insufficiency of

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the evidence. He argues that without the polygraph evidence and the identification evidence, there was no evidence to connect defendant with the crime. As we have held, *supra*, this evidence, however, was properly admitted. This assignment of error is summarily dismissed.

[4] By his sixth assignment of error, defendant contends that the court erred in denying his motion for a recess to enable defendant to locate one of his witnesses. A motion to recess to enable one to locate witnesses is addressed to the discretion of the trial court. *State v. Ford*, 297 N.C. 144, 254 S.E. 2d 14 (1979). We find no abuse of discretion in the present case. Defendant sought to introduce the testimony of this witness, a police officer, to show that the descriptions of the robber initially given by the eyewitnesses differed greatly from the descriptions given later by them. Defendant, however, did not subpoena this witness prior to trial. Moreover, he had the opportunity to cross-examine the eyewitnesses as to any inconsistent statements they may have made.

By his remaining assignments of errors defendant contends the court erred in denying his post-verdict motions for relief from the verdict due to errors made at trial. For the reasons stated, *supra*, we hold defendant received a fair trial, free from prejudicial error. These motions were properly overruled.

No error.

Chief Judge HEDRICK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. STEPHEN NED ALLEN

No. 8523SC141

(Filed 1 October 1985)

1. Homicide § 21.7— second degree murder—malice—evidence sufficient

There was sufficient evidence of second degree murder where defendant went to the victim's house and demanded that the victim let him have certain furniture in the house; the victim refused and defendant left; defendant went *drinking and carousing with several different people* and borrowed a pistol at his brother-in-law's house; defendant stopped alongside the road and test-fired the gun; defendant then went back to the victim's house, held up the pistol,

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cocked it, and pointed it at the victim's face when the victim answered the door; defendant demanded his furniture, the victim said "I dare you" and grabbed defendant's arm; the cocked pistol discharged; the medical evidence showed that the bullet entered through the mouth and exited from the victim's neck having shattered the spinal cord; the victim fell; and defendant ran. Intentionally pointing a loaded, cocked pistol at an adversary's head could be seen as an act demonstrating wickedness, hardness of heart, cruelty or a mind deliberately bent on mischief from which the jury could properly infer malice.

2. Constitutional Law § 31— denial of funds for private investigator—no error

The trial court did not err in a prosecution for murder by denying defendant's motions for the appointment of a private investigator at State expense where defendant's theory was that although his gun discharged, the bullet did not strike the victim and that someone came later and killed the victim; defendant's theory was based on street talk that defendant had informed on several people currently on trial for drug charges; that some neighbors had heard more than one shot the night the victim was killed; that the bullet jacket found could not be positively identified as coming from defendant's gun; that there was a bullet hole in the kitchen window of the victim's house; that the medical examiner initially believed the victim had been shot from behind; that a black pickup had been seen parked near the victim's that night; and that a black pickup had been involved in an incident with the defense attorney investigating this case. There was nothing in defendant's theory which, even if proved, would be inconsistent with the version of events as found by the jury. G.S. 7A-450(b).

3. Arrest and Bail § 9— murder—denial of bail—no abuse of discretion

In a prosecution for first degree murder in which defendant was convicted of second degree murder, the trial court did not abuse its discretion by denying defendant's requests for the court to set bond where the evidence available to the court prior to trial tended to show first degree murder. Furthermore, defendant showed no prejudice from his pretrial incarceration in that no allegation was made as to how defendant could have assisted in his own defense any more than he did.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 11 October 1984 in Superior Court, ASHE County. Heard in the Court of Appeals 23 September 1985.

Defendant was arrested on 12 May 1984 and charged with the first degree murder of Gene Hart. During pre-trial proceedings defendant made repeated motions for bond to be set, and two motions for the court to appoint at State expense a private investigator to help in the preparation of his defense. These motions were all denied.

At the close of the State's evidence and the close of all the evidence, defendant made a motion to dismiss for insufficient evi-

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dence. These motions were denied. The trial judge instructed the jury as to first degree murder, second degree murder and involuntary manslaughter. The jury returned a verdict of guilty of second degree murder, and defendant was sentenced to fifty years imprisonment. Defendant appeals.

Attorney General Thornburg by Assistant Attorney General Steven F. Bryant for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Geoffrey C. Mangum for defendant appellant.

PARKER, Judge.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss as to second degree murder, claiming the evidence, when viewed in the light most favorable to the State, is sufficient to convict only of involuntary manslaughter.

Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice by some unlawful act not amounting to a felony or naturally dangerous to human life, or by an act or omission constituting culpable negligence. *E.g.*, *State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984). In *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963), our Supreme Court said:

It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton and reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter.

Id. at 459, 128 S.E. 2d at 893.

In comparison, second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *E.g.*, *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). The specific intent to kill is not an essential element of either second degree murder, *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983), or involuntary manslaughter. *Watson* at 398, 312 S.E. 2d at 457. However, neither crime exists in the absence of some intentional act in the chain of causation leading to death.

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State v. Wilkerson, 295 N.C. 559, 580, 247 S.E. 2d 905, 917-918 (1978). For that intentional act to support a conviction for second degree murder, it must be sufficient to show malice. *Id.* Involuntary manslaughter differs from second degree murder only in that malice is present in the latter but not the former. *State v. Setzer*, 42 N.C. App. 98, 256 S.E. 2d 485, *cert. denied*, 298 N.C. 571, 261 S.E. 2d 127 (1979).

Malice is an often discussed and sometimes ill-used term in the law of homicide. In her dissenting opinion in *State v. Wrenn*, 279 N.C. 676, 684-689, 185 S.E. 2d 129, 133-136 (1971), Justice, later Chief Justice, Sharp discussed malice in a passage which has been cited and quoted with approval numerous times since. She wrote:

Malice has many definitions. To the layman it means hatred, ill will or malevolence toward a particular individual. To be sure, a person in such a state of mind or harboring such emotions has actual or particular malice. In a legal sense, however, malice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse; "whatever is done 'with a willful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means constitutes legal malice.'" It comprehends not only particular animosity "but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person."

Id. at 686-687, 125 S.E. 2d at 135 (citations omitted).

In the instant case the evidence tended to show that on the evening of 11 May 1984, defendant went to Hart's house and demanded that Hart let him have certain furniture in the house. Hart refused and defendant left. Defendant then went drinking and carousing with several different people and at one point stopped at his brother-in-law's house. At his brother-in-law's house, he borrowed a pistol. Defendant stopped alongside the road and tested the gun. Defendant then went back to Hart's house. When Hart answered the door, defendant held up the pistol, cocked it and pointed it at Hart's face. Defendant demanded his furniture. Hart said, "I dare you" and grabbed defendant's arm causing the

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cocked gun to discharge. The medical evidence showed that the bullet entered through the mouth and exited from the victim's neck having shattered the spinal cord. Hart fell; defendant ran.

When the evidence is viewed in the light most favorable to the State, as it must be on defendant's motion to dismiss, *State v. Stanley*, 56 N.C. App. 109, 286 S.E. 2d 865 (1982), a rational jury could find the existence of the element of malice. Intentionally pointing a loaded, cocked pistol at an adversary's head could be seen as an act demonstrating wickedness, hardness of heart, cruelty or a mind deliberately bent on mischief from which the jury could properly infer malice. *Wrenn, supra*.

[2] Defendant's next assignment of error is that the trial court erred in denying his motions for the appointment of an investigator at State expense. Defendant moved on 14 June and again on 22 August for funds to hire an investigator to assist in the preparation of his defense. Both motions were denied.

G.S. 7A-450(b) provides: "Whenever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." As applied to defense requests for private investigators, the statute has been interpreted to require the appointment of an investigator for the defendant at State expense only when there is a reasonable likelihood that a private investigator will materially aid defendant in the preparation or presentation of evidence or that without such help it is probable the defendant will not receive a fair trial. *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984). The appointment should be made "with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense." *State v. Tatum*, 291 N.C. 73, 82, 229 S.E. 2d 562, 568 (1976).

Defendant here alleged a need for a private investigator to look into allegations that the victim had "underworld connections" and several enemies. Defendant's theory was that although his gun discharged, the bullet did not strike Hart and that someone came later and killed Hart. Defendant based this theory on "street talk" that defendant had informed on several people currently on trial for drug charges; that some neighbors had heard more than one shot the night Hart was killed; that the bullet

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jacket found could not be positively identified as coming from defendant's gun; that there was a bullet hole in the kitchen window of Hart's house; that the Medical Examiner initially believed Hart had been shot from behind; and that a black pickup had been seen parked near Hart's that night and a black pickup had been involved in an "incident" with the defense attorney while he was investigating his client's case.

These facts and speculations fall far short of the requirement of showing "specific evidence reasonably available and necessary for a proper defense." There is nothing in this theory which, even if proved, would be inconsistent with the version of events as found by the jury. "The State is not required by law to finance a fishing expedition for defendant in the vain hope that something will turn up." *State v. Alford*, 298 N.C. 465, 469, 259 S.E. 2d 242, 245 (1979).

The recent U.S. Supreme Court decision in *Ake v. Oklahoma*, 53 U.S.L.W. 4179 (U.S. Feb. 26, 1985), cited by defendant, does not compel a different result here. In that case, the Court enumerated three factors which govern whether "the basic tools of an adequate defense or appeal," which the State must provide for an indigent criminal defendant have in fact been provided. *Id.* at 4182. These are (i) the private interest affected; (ii) the governmental interest affected if the additional safeguard is to be required; and (iii) the probable value of the additional safeguard and the risk of erroneous deprivation of the affected private interest if the safeguard is not provided. *Id.* The Court held that where the defendant has made a pretrial showing that sanity is likely to be a factor in his defense, the State must provide the indigent defendant with funds to hire a psychiatrist to examine defendant and testify for him. However, the Court noted the "elusive and deceptive" nature of psychiatry and the unique role a psychiatrist would play in the effective presentation of an insanity defense. *Id.* These considerations simply do not apply here.

The *Ake* decision emphasized that "meaningful access to justice" is the goal in determining what tools must be provided to an indigent defendant by the State. *Id.* at 4181. Defendant here has no colorable claim that he was denied "meaningful access to justice." He was given competent legal counsel who had a duty to investigate and he failed to put forward the requisite showing of

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necessity for a private investigator. The trial court did not err in refusing to appoint an investigator to assist defendant.

[3] Defendant's final assignment of error is that the trial court erred in denying his repeated requests for the court to set bond. Defendant alleges he was prejudiced in that he was unable to effectively assist counsel in preparing his defense while incarcerated. Defendant's arguments are without merit. The evidence available to the trial court prior to trial tended to show first degree murder. In such a case, the trial judge is not required to grant defendant bond although he may do so in his discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

While the weight of the evidence presented at the bond hearings may have shown defendant to be a good candidate for pre-trial release despite the severity of the charge against him, there was no abuse of discretion by the trial court in denying bond. Further, defendant has shown no prejudice resulting from his pre-trial incarceration. No allegation is made as to how the defendant could have assisted in his own defense any more than he did. The trial court did not err in treating defendant's case as a capital case for the purpose of setting bond, see *State v. Sparks*, 297 N.C. 314, 255 S.E. 2d 373 (1979), and in exercising its discretion to deny bond.

Defendant's remaining assignments of error stated in the record on appeal were not argued or supported by authority in his brief and are, therefore, deemed abandoned. Rule 28(b)(5), N.C. Rules App. Proc.

Having carefully considered all of defendant's arguments, we conclude that defendant received a fair trial free of prejudicial error.

No error.

Chief Judge HEDRICK and Judge BECTON concur.

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N. C. COASTAL MOTOR LINE, INC. v. EVERETTE TRUCK LINE, INC.

No. 8410SC1328

(Filed 1 October 1985)

Carriers § 3; Sales § 17.1— sale of ICC operating authority— rendered valueless by deregulation— no breach of warranty

The trial court erred by denying plaintiff's motion for summary judgment and by granting summary judgment for defendant on its own motion in an action arising from the purchase by defendant of plaintiff's ICC operating authority to engage in interstate trucking operations where defendant refused to make a payment on the purchase price, plaintiff filed an action to collect the remaining purchase price, and defendant admitted all pertinent allegations of a valid contract and alleged breach of an implied and express warranty for continued value of the ICC operating authority in that deregulation of interstate trucking rendered the operating authority worthless. There was nothing in the pleadings which would give rise to an "express but implied" warranty of permanent economic value; the agreement drafted by defendant's attorney expressly limited plaintiff's warranty to no pending actions or proceedings which would affect the operating rights purchased by defendant; the agreement itself was premised on the concept that the operating rights were subject to governmental action; and defendant's pleadings and allegations regarding the existence of an oral warranty through representations by plaintiff did not establish a material issue of fact. G.S. 1A-1, Rule 56.

APPEAL by plaintiff from *Barnette, Judge*. Judgment entered 25 July 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 21 August 1985.

This is a breach of contract action instituted by plaintiff 16 July 1982. On 14 September 1977, defendant, Everett Truck Line, Inc. (Everette) contracted with plaintiff, N. C. Coastal Motor Line, Inc. (Coastal) to purchase plaintiff's Interstate Commerce Commission (ICC) operating authority to engage in interstate trucking operations. The agreed purchase price was \$200,000 to be paid in eight yearly installments of \$25,000. Everette made payments for four years, for a total of \$100,000, but refused to make the fifth payment when it became due. Coastal thereupon instituted this action.

Everette filed an answer admitting all pertinent allegations of a valid contract to purchase the ICC operating authority for \$200,000 payable in eight yearly installments of \$25,000. As an affirmative defense, Everette alleged justification for the nonpayment of the contract price due to breach of an implied and ex-

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press warranty of continued monetary value of the ICC operating authority. Everett alleged that the deregulation of interstate trucking that occurred three years after the execution of the sales contract rendered the ICC authority worthless. Everett also filed a counterclaim for \$58,000 which Everett contends represents the difference between the \$100,000 Everett paid and the fair market value for the use and benefit of the ICC operating authority for the period of forty-two (42) months the ICC operating authority was of value to Everett. Coastal filed a reply denying all pertinent allegations of the counterclaim.

On 13 March 1984, Coastal filed a motion for summary judgment together with supporting affidavits. Everett filed opposing affidavits 25 June 1984. On 11 July 1984, the court: (1) denied Coastal's motion for summary judgment on its case in chief, (2) granted Coastal summary judgment on Everett's counterclaim, (3) granted Everett summary judgment on Coastal's claim. Coastal appeals.

Coastal did not include exceptions in the Record on Appeal as required by Rule 10(b)(1), N.C. Rules of Appellate Procedure. However, all assignments of error apply to the entry of summary judgment and no record was maintained. Coastal also did not state Exceptions and Assignments of Error pertaining to the questions set forth in the argument, as required by Rule 28(b)(5), N.C. Rules of Appellate Procedure. In order to prevent any injustice to Coastal, we suspend the requirements of Rules 10(b)(1) and 28(b)(5) as authorized by Rule 2, N.C. Rules of Appellate Procedure, and consider Coastal's arguments.

William C. Stuart, III, for plaintiff appellant.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Carson Carmichael, III, for defendant appellee.

JOHNSON, Judge.

The question we are called upon to decide is whether Everett pleaded an affirmative defense such that it was entitled to a summary judgment as a matter of law. We conclude that as a matter of law Everett was not entitled to a summary judgment.

The purpose of G.S. 1A-1, Rule 56 motion for summary judgment is to avoid a useless trial. *See, Pridgen v. Hughes*, 9 N.C.

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App. 635, 177 S.E. 2d 425 (1970). The initial applications of the rule in this country were primarily actions in which debtors chose to defend rather than default. *Id.* In pertinent part G.S. 1A-1, Rule 56(c) provides:

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(c).

Courts have construed the design of the rule to enable claimants to penetrate unfounded defenses prior to trial. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E. 2d 379, 381 (1975).

Everette was granted a summary judgment upon the court's own motion. Rule 56 does not require that a party move for summary judgment in order to be entitled to it. *Greenway v. N. C. Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 241 S.E. 2d 339 (1978). However, the nonmovant must be entitled to the judgment as a matter of law. *A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979); Rule 56(c), N.C. Rules of Civ. P. We conclude that Everette was not entitled to summary judgment as a matter of law.

The forecast of the evidence that would have been submitted at trial as admitted by Everette was that the parties entered into a valid binding agreement which was consummated 14 September 1977. At the time of the purchase Coastal's operating rights were as warranted, and those rights were vested in Everette upon approval of the ICC. The purchase price and balance unpaid were not disputed by Everette. The agreement had a separate leasing provision pending approval by the ICC of the outright sale of Coastal's operating rights. Thus, the essential elements of Coastal's breach of contract action are met, and there is no material issue of fact with respect to those essential elements. All that remains is payment as scheduled by the agreement.

Everette admits the signing of the contract, validity of the contract, and the sale price, which are the essential terms of any instrument. Specifically, in its answer Everette admits the parties signed the contract, ". . . which to become valid or invalid upon

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whatever action was taken in the matter of this agreement by the Interstate Commerce Commission (I.C.C.). . . ." (Emphasis added.) The epitome of Everett's contradictory argument is contained in its answer: "There was an *express but implied warranty* on the part of plaintiff that the intangible operating 'rights' and authority would be of permanent value to the defendant." (Emphasis added.) Defendant's affidavits make broad generalizations to "representations" of Coastal during negotiations which might be express warranties if they were so proven. However, the instrument drawn up by Everett expresses the parties' intent with respect to plaintiff's warranty of its operating rights. Under section nine (9) entitled, SELLER'S WARRANTIES, it states in subsection (a) "There are *no proceedings pending* which adversely affect the operating rights proposed to be transferred." (Emphasis added.) Everett now argues that government deregulations in 1980, three years after the contract was entered into, rendered plaintiff's operating rights worthless, and thus breaches an "express but implied warranty" of permanent economic value. We find nothing in the pleadings which gives rise to such an implied warranty. Defendant cites no authority for this assertion; nor do we find any case precedent in our research to support a claim of an implied warranty of permanent economic value of an intangible right. However, there are some applicable principles to interpret the parties' agreed upon warranty. "Ordinarily there can be no implied warranty of quality in the sale of personal property where there is an express warranty on the subject, and where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them." *Perfecting Service Co. v. Prod. & Dev. Sales Co.*, 261 N.C. 660, 667, 136 S.E. 2d 56, 62 (1964). Everett's attorney drafted the terms of the agreement whereby Coastal's warranty was expressly limited to no *pending* actions or proceedings which would affect the operating rights purchased by Everett. The agreement itself was premised on the concept that these operating rights were subject to governmental action. Thus, Everett's allegations of implied warranty raise no issue of material fact which as a matter of law is significant with respect to any essential elements of Coastal's claims.

The parties' agreement was premised on approval by action of a governmental entity, and there was an express warranty pertaining to pending proceedings. Everett contends governmental

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deregulation was not foreseeable and that there were representations by Coastal to the effect that the operating authority would retain permanent value. Everett's pleadings and affidavits regarding the existence of an oral warranty through representations by Coastal do not establish a material issue of fact. "The obligation arising upon a warranty is that of an undertaking or promise that the goods shall be as represented or, more specifically, a *contract of indemnity*, against loss by reason of defects therein." *Prod. & Dev. Sales Co.*, at 669, 136 S.E. 2d at 63. In the agreement we find a written expression of Coastal's warranty which defendant in essence is seeking to expand. "The general rule is that when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument." *Root v. Allstate Ins. Co.*, 272 N.C. 580, 587, 158 S.E. 2d 829, 835 (1968). In the absence of allegations of fraud, mistake, duress or ambiguous terms, which Everett did not allege, any allegations of additional warranties or variation of the written agreement would not raise any issue of material fact and would be properly excludable. *Id.*

Everette also raised lack of consideration as an affirmative defense. In light of the foregoing discussion, defendant was not entitled to a summary judgment as a matter of law. At the time of purchase Coastal's operating rights were as represented, a valuable set of rights which Everett could not have otherwise acquired. Everett is without a legal defense to Coastal's claim.

Ordinarily, we would not review the denial of plaintiff's motion for summary judgment because of the interlocutory character of a denial of a motion for summary judgment. *Motyka v. Napier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970). In most instances the denial of a motion for summary judgment only establishes that there is a material issue of fact. However, in the case *sub judice*, we have established the law of the case in order to properly review Coastal's appeal from the court's granting Everett a summary judgment, which is a final determination on the merits of the case.

Since Coastal was the movant, it must meet a strict standard that will resolve all inferences in the nonmovant's favor. *Id.*

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Everette has eased that burden by admitting in its answer the essential elements in an action on a contract.

Everette did not plead any legally recognizable defense to Coastal's claim. We agree with the court below that there was no genuine issue of material fact. We conclude that because the court below erred as a matter of law Coastal was wrongfully denied summary judgment.

The trial court correctly granted Coastal's motion for summary judgment on Everette's counterclaim. There was no basis for Everette's request to reform the contract into a leasing agreement. There were separate leasing provisions, distinct and apart from those provisions concerning the outright sale of Coastal's rights. Once the ICC approved the sale, Coastal's rights were purchased and became vested in Everette, with payment being the only performance remaining. We conclude that (1) the trial court erred by granting Everette's motion for summary judgment, (2) the trial court erred by denying Coastal's motion for summary judgment, and (3) the trial court was correct in granting Coastal's motion for summary judgment with respect to Everette's counterclaim. The case is remanded with instructions for the entry of summary judgment for Coastal.

Reversed in part, affirmed in part and remanded.

Judges EAGLES and PARKER concur.

MICHAEL D. HAYMAN, SEAFARE CORPORATION AND MY LADY RACHEL, INC. v. WILLIAM A. STAFFORD AND WIFE, VANESSA C. STAFFORD, AND UNITED MANAGEMENT GROUP, INC.

No. 841SC1341

(Filed 1 October 1985)

Brokers and Factors § 1.1; Trusts § 13— sale of client's real property by financial manager—commission—not subject to real estate license law

The trial court erred by granting summary judgment for plaintiffs and by not rendering partial summary judgment for defendants where plaintiffs were in financial distress and asked the male defendant, a financial manager, to help them; the parties agreed that plaintiffs would convey real property to defend-

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ants and that the male defendant would manage or sell it for plaintiffs' benefit; part of the property was sold; defendants retained a fee; and plaintiffs sued to recover the fee. Defendant financial manager was beyond the purview of the Real Estate License Law because he was a trustee; the land was conveyed to defendants not just to obtain a better price than plaintiffs could get, but also to enable defendant to obtain time from plaintiffs' creditors, avoid a distress sale under foreclosure, and pay plaintiffs' debts. G.S. 93A-2(c)(5).

Judge EAGLES dissenting.

APPEAL by defendants from *Watts, Judge*. Judgment entered 4 October 1984 in Superior Court, DARE County. Heard in the Court of Appeals 7 June 1985.

Defendants' appeal is from an order of summary judgment holding that plaintiffs are entitled to recover \$70,000 of them; an amount that defendants retained as compensation from the sales price of certain real property that they held and sold for plaintiffs' benefit. Plaintiffs sued to recover the money, alleging that it was a fee for selling real estate, which defendants have no license to do. The evidence before the trial court was to the following effect:

Plaintiff Hayman was the majority stockholder of Seafare Corporation, a Nags Head restaurant business, and My Lady Rachel, Inc., both of which owned real property on Nags Head Beach. Defendant William A. Stafford, a Virginia resident, is a financial management consultant who does business through a Virginia corporation known as United Management Group, Inc. During 1982 Seafare Corporation was in precarious financial condition and at Hayman's request Stafford arranged for the company to borrow \$300,000 from a Virginia bank, and was paid \$15,000 for his services. But before long Seafare was again behind in paying its creditors, including the Virginia bank which had a mortgage on the restaurant and was threatening to foreclose, the Internal Revenue Service which was threatening to padlock the restaurant, and the power company which had cut off the electricity for the restaurant. Hayman attempted to alleviate the situation by selling some of the corporate-owned real estate, but the offers he obtained were below the market value of the properties because it was generally known by Nags Head business people that he was in straitened circumstances and had to sell. He consulted Stafford again about his financial difficulties and the possible solutions to them, and after conferring together several

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times they concluded that the only feasible courses that were available to him were either to let the bank go ahead and foreclose on the mortgaged property, or to file for reorganization in bankruptcy, or to convey the corporate real property to a third person who could sell it for its true value and apply the proceeds to the debts and expenses. Hayman chose the latter course and asked Stafford to be that third person because he knew that Stafford stood well with the bank and could forestall foreclosure, at least for awhile, and people would know that he was not under pressure to sell. At first Stafford refused to cooperate and suggested that Hayman employ a local lawyer or anyone else that he had confidence in to handle the matter, but later he agreed to serve subject to certain conditions which were written into an offer to purchase agreement for each piece of property. Among other things, the purchase agreements and other papers, which were prepared by a lawyer in accord with instructions received from both parties, provided that Stafford as buyer would receive the property, would assume all of the debts against it, would manage and sell the property, and in the event of a sale would pay the debts, expenses and his "commission as Financial Advisor to the Seller," and would return any surplus to plaintiffs. The papers also provided that the amount of Stafford's compensation would be covered by separate agreements between him and the corporations. None of these documents were signed by the parties, however, because Hayman did not approve some of the provisions concerning the restaurant furnishings; nevertheless the parties proceeded as planned. Hayman's corporations deeded the property involved to Mr. and Mrs. Stafford on 18 February 1983 and Stafford took charge of the property, forestalled foreclosure by the bank, and communicated with prospective purchasers about buying the property and with lending institutions about financing its purchase. On 3 March 1983, Stafford sold some of the property for \$850,000 and from the cash payment of \$200,000 he retained \$70,000 as a "[f]ee paid to United Management Group, Inc. per agreement between Seafare Corporation and W. A. Stafford."

Several months later plaintiffs sued to recover the fee, alleging that there was no agreement for compensation or that if there was it was void because none of the defendants are licensed to sell real estate in North Carolina. In their answer defendants denied that there was no agreement about their compensation

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and that they had violated the North Carolina Real Estate License Law. After much discovery by both parties plaintiffs moved for judgment on the pleadings and defendants moved for summary judgment. The court denied defendants' motion and entered summary judgment for plaintiffs.

Trimpi, Thompson & Nash, by John G. Trimpi, for plaintiff appellees.

Leroy, Wells, Shaw, Hornthal & Riley, by Dewey W. Wells, for defendant appellants.

PHILLIPS, Judge.

In entering judgment for the plaintiffs the court concluded from the evidence presented as a matter of law that in selling the property involved defendants violated the provisions of our Real Estate License Law which prohibits unlicensed persons from selling real estate for others in certain instances. G.S. 93A-1 provides that "it shall be unlawful for any person, partnership, association or corporation . . . to act as real estate broker . . . without first obtaining a license issued by the North Carolina Real Estate Commission." G.S. 93A-2(a), in pertinent part, provides that a real estate broker is anyone who for a valuable consideration sells or offers to sell real estate for others. And G.S. 93A-2(c)(5), in pertinent part, states that the provisions of Chapter 93A do not apply to "[a]ny person, while acting as a trustee under a trust agreement, deed of trust or will, . . ." Defendants contend that the evidence before the court indisputably establishes that Stafford held and sold the property involved as a trustee for the plaintiffs and thus did not violate the Real Estate License Law in doing so. We agree. The evidence plainly shows, as plaintiffs concede, that the land was conveyed to defendants not just to enable Stafford to resell it at a better price than plaintiffs could get for it, but also to enable Stafford to obtain time from plaintiffs' creditors, avoid a distress sale under foreclosure, and pay plaintiffs' debts. In their brief plaintiffs further concede that in holding the land for plaintiffs' benefit and paying their debts from the sale price that defendants acted in a fiduciary capacity and were trustees for plaintiffs "in a sense." We think that Stafford was a trustee in every sense and was thus beyond the purview of the Real Estate License Law.

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Plaintiffs' own evidence indisputably shows that by agreement they turned their property and financial problems over to defendants and that all of the elements of a trust were present: The plaintiffs were in financial distress and asked defendants to help them; the parties agreed that plaintiffs would convey their property to defendants and that defendants would either manage or sell it for the plaintiffs' benefit; and their agreement in that respect was fully carried out. The property was conveyed and defendants sold part of it, used the proceeds for plaintiffs' benefit and stands ready to return the unsold property to plaintiffs. That the parties did not sign the agreements is immaterial; the Statute of Frauds, G.S. 22-2, does not apply to executed contracts. *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785 (1954). Since the terms were discussed, agreed to, and substantially performed by all concerned they constitute a perfectly valid trust agreement between the parties; and since defendants sold plaintiffs' land under that agreement Chapter 93A has no application, as G.S. 93A-2(c)(5) explicitly provides. The summary judgment entered for the plaintiffs was therefore in error and we vacate it. The court also erred in not rendering partial summary judgment for the defendants, because the evidence indisputably shows that defendants sold the land under a valid agreement entitling them to be compensated for their services; only the amount of the commission or compensation due defendants is in doubt and is an issue of fact for the court below to determine.

The judgment in favor of the plaintiffs is vacated and the cause is remanded for further proceedings in accord with this opinion.

Vacated and remanded.

Judge BECTON concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I dissent. I disagree with the majority's conclusion that the evidence establishes that Stafford was exempt from the licensing requirements of G.S. Chapter 93A. In my judgment his conduct, considering all the circumstances of record, did not qualify him

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for exemption as a trustee pursuant to the provisions of G.S. 93A-2(c)(5).

The Real Estate Licensing Act, Chapter 93A of the General Statutes, is designed for the public's protection, to assure that persons engaged in selling real estate for compensation be regulated. Statutory exemptions should be construed very carefully to assure that the purposes of the Act are not frustrated and that the consuming and using public is protected. The majority opinion would open the door to real estate sales by unlicensed persons who call themselves "trustees" but nevertheless are involved in the transaction primarily as sales agents for compensation.

NORTH CAROLINA BOARD OF EXAMINERS FOR SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS v. NORTH CAROLINA STATE BOARD OF EDUCATION, A. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC INSTRUCTION, NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, CITY OF KINSTON BOARD OF EDUCATION, CHERYL D. MALONE, DUANE O. MOORE, SUPERINTENDENT OF THE KINSTON CITY SCHOOLS, MACON COUNTY BOARD OF EDUCATION, LONNIE H. CRAWFORD, SUPERINTENDENT OF MACON COUNTY SCHOOLS, AND PATRICIA MORGAN CABE

No. 8510SC16

(Filed 1 October 1985)

Professions and Occupations § 1— certificate in speech pathology—license required for audiology

A person certified by the Department of Public Instruction in speech and language pathology is not exempt under G.S. 90-294(c)(4) from the licensing requirements for audiologists and may not practice audiology without a license.

APPEAL by defendants from *Barnette, Judge*. Judgment entered 7 November 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 23 August 1985.

This is a declaratory judgment action in which plaintiff sought construction of G.S. 90-294(c)(4), which exempts from the licensing requirements of the Licensing Act for Speech and Language Pathologists and Audiologists (the Act), G.S. 90-292 *et seq.*:

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A person who holds a valid and current credential as a speech and language pathologist or audiologist issued by the North Carolina Department of Public Instruction or who is employed by the North Carolina Schools for the Deaf and Blind, if such person practices speech and language pathology or audiology in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction or the Department of Human Resources respectively.

The present controversy arose when two persons, defendants Cheryl D. Malone and Patricia Morgan Cabe, certified by the North Carolina Department of Public Instruction in speech and language pathology, engaged in the practice of audiology. Upon receiving complaints that Malone and Cabe were engaged in the practice of audiology without a license, plaintiff instituted investigative proceedings against them. Defendants resisted these proceedings on the grounds they were exempted from the licensing requirements of the Act through G.S. 90-294(c)(4). They relied upon an opinion of the North Carolina Attorney General which construed G.S. 90-294(c)(4) as stating that so long as one is certified by the Department of Public Instruction in either speech and language pathology or audiology, that person is completely exempted from the Act and may practice in both fields without a license. Plaintiff, urging a more narrow interpretation of G.S. 90-294(c)(4) by arguing that one certified in one field is exempt from the Act only in the field for which one is certified, filed this declaratory judgment action. After hearing arguments, the trial court agreed with plaintiff and ruled:

1. The General Assembly intended that a person employed in the public school system under the jurisdiction of the Department of Public Instruction would be exempt from licensure under G.S. 90-294(c)(4) only for practice or activity in the specific field of certification by the State Board of Education or Department of Public Instruction, and that a person employed and certified as a speech pathologist would not be exempt from the licensure law with respect to the practice of audiology.

2. The North Carolina Board of Examiners has jurisdiction and regulatory authority over employees of local school boards and the Department of Public Instruction and State

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Board of Education with respect to activities within the field of audiology engaged in by persons who are certified by the State Board of Education or the Department of Public Instruction in the field of speech and language pathology only.

3. Employees of local school boards are deemed to be persons practicing under the jurisdiction of the Department of Public Instruction for the purpose of qualifying for the exemption as being employed in an exempt setting, so long as they do not engage in the practice of audiology if they are certified by the State Board of Education or Department of Public Instruction in the field of speech and language pathology alone.

From this decision, defendants appealed.

Randall, Yaeger, Woodson, Jervis & Stout, by John C. Randall, for plaintiff appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Edwin M. Speas, Jr.; Richard S. Jones, Jr.; and Morris, Rochelle and Duke, by Thomas H. Morris, for defendant appellants.

JOHNSON, Judge.

In construing a statute, we are guided by the primary rule of construction that the intent of the legislature controls. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). In determining the legislative intent, we must look to the language of the act, its legislative history, and the circumstances surrounding the enactment of the act with an eye towards the evil sought to be remedied. *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548 (1967). We must avoid a construction which will defeat or impair the object of a statute, and should give the statute a construction which, when practically applied, will tend to suppress the evil which the legislature sought to avoid. *In re Hardy, supra*. We must consider and interpret as a whole parts of the same statute dealing with the same subject. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968).

With these principles of statutory construction in mind, we construe the statute. The intent of the General Assembly and the evil to be avoided are clearly stated in G.S. 90-292:

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It is declared to be a policy of the State of North Carolina that, in order to safeguard the public health, safety, and welfare; to protect the public from being misled by incompetent, unscrupulous, and unauthorized persons and from unprofessional conduct on the part of qualified speech and language pathologists and audiologists and to help assure the availability of the highest possible quality speech and language pathology and audiology services to the communicatively handicapped people of this State, it is necessary to provide regulatory authority over persons offering speech and language pathology and audiology services to the public.

It is also clear from the Act that speech and language pathology and audiology are two separate and distinct fields. G.S. 90-294(a) significantly provides: "Licensure shall be granted in *either* speech and language pathology *or* audiology independently. A person may be licensed in *both areas if he is qualified.*" (Emphasis added.) This separateness and distinctness is borne out further in the definitions to the Act. "The practice of audiology" is defined as "the application of principles, methods, and procedures of measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation or rehabilitation related to hearing and disorders of hearing for the purpose of identifying, preventing, ameliorating, or modifying such disorders and conditions in individuals and/or groups of individuals." G.S. 90-293(6). "The practice of speech and language pathology" is defined as "the application of principles, methods, and procedures for the measurement, testing, evaluation, prediction, counseling, instruction, habilitation, or rehabilitation related to the development and disorders of speech, voice, or language for the purpose of identifying, preventing, ameliorating, or modifying such disorders." G.S. 90-293(7). This distinctness and separateness is borne out even further by the repeated and consistent usage of the disjunctive "or": "speech and language pathology *or* audiology." See, e.g. 90-293(8)(d); 90-294(a); 90-294(b); 90-294(c)(1); 90-294(c)(2); 90-294(h); 90-295; 90-295(2); 90-295(2)(c); 90-295(2)(d); 90-295(4); 90-297(b); 90-298(b); 90-299; and 90-302(2).

To be eligible for licensing, an applicant must complete, *inter alia*, thirty semester hours of coursework in courses "that provide information relative to communication disorders and information about and training in evaluation and management of speech,

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language and hearing disorders. At least 24 of these 30 semester hours must be in courses in the professional area (speech and language pathology or audiology) for which the license is requested, and no less than six semester hours may be in audiology for the license in speech and language pathology or in speech and language pathology for the license in audiology." G.S. 90-295(2)(b). Thus, while the General Assembly has provided for a curriculum which provides exposure to both fields, it has required an applicant to have in-depth training and education in the particular field for which an applicant is seeking licensing to practice, consistent with its aim of providing for the "highest possible quality speech and language pathology services to the communicatively handicapped people of this State." It would thus defeat the legislature's intent if one licensed in one field only were allowed to practice in the other field as the public would not be receiving the "highest possible quality" services.

A fortiori, it follows that the General Assembly did not intend for one certified by the Department of Public Instruction in speech and language pathology to practice audiology as the hearing impaired child would not be receiving the highest possible quality audiological services. The defendants' construction of G.S. 90-294(c)(4) contravenes the legislative intent and must be disregarded. The trial court's construction best follows the legislative intent.

Alternatively, defendants contend that G.S. 90-294(b) prevents the licensing board from exercising any authority over any person holding any certificate from the State Board of Education and employed by a local board of education. G.S. 90-294(b) provides in pertinent part: "Nothing in this Article, however, shall be considered to prevent a qualified person licensed in this State under any other law from engaging in the profession for which such person is licensed." G.S. 90-294(b) is not applicable to the present case because it does not come into play unless one is being prevented from engaging in a profession for which one is licensed under another law. Here, if it is assumed *arguendo* a certificate from the Department of Public Instruction is a license, defendants Malone and Cabe have not been prevented from engaging in the practice of speech and language pathology.

Defendants also contend that summary judgment for plaintiff was improper because there is an issue of fact as to whether de-

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fendants Malone and Cabe were engaged in the practice of audiology. Defendants, however, stipulated that they were engaged in the practice of audiology. This contention is without merit.

For the foregoing reasons, we find no error in the trial court's findings and conclusions. The court's judgment is

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. KENNETH LLOYD CALLAHAN

No. 8427SC1190

(Filed 1 October 1985)

1. Criminal Law § 22— absence of arraignment—no reversible error

The absence of formal arraignment in a prosecution for possessing cocaine with intent to sell or deliver and delivery of cocaine did not amount to reversible error where defendant did not state that he had not been informed of the charges, there could be no doubt from the record that defendant was fully aware of the charges, and the court summarized the charges to the jury and stated that defendant had entered a plea of not guilty. G.S. 15A-1213.

2. Criminal Law § 87.3; Bills of Discovery § 5— notes from which typewritten statement made—not produced—no error

The trial court did not err in a prosecution for possession of cocaine with intent to sell or deliver and delivery of cocaine by refusing to order production of an officer's "scribbled" notes from which he made a typewritten statement. The typed statement was read into evidence and was thus obviously produced as required by statute; there was no evidence that the State had the "scribbled" notes in its possession or that the officer still had them at the time of trial. G.S. 15A-903(f)(2).

3. Criminal Law § 42.6— cocaine—chain of custody—sufficient

In a prosecution for possession of cocaine with intent to sell or deliver and delivery of cocaine, the evidence was sufficient to establish a proper chain of custody as to a white powder where a SLED agent placed a red seal on the envelope containing the white powder, initialed it, and delivered it to the SLED lab in South Carolina; the SLED chemist obtained this envelope from his personal locker to which the chief chemist also had a set of keys; and the red seal was unbroken when the chemist obtained the envelope. The evidence was sufficient to reasonably support the conclusion that the substance analyzed was the same as that delivered to the SLED lab by the agent.

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4. Criminal Law § 14—jurisdiction—failure to instruct—no error

The trial court did not err by refusing defendant's requested jury instruction on jurisdiction where defendant was not charged with the sale of cocaine in North Carolina but with the offenses of possessing cocaine with intent to deliver and delivery of cocaine; the evidence indicated that if the offenses of possession of cocaine with intent to deliver and delivery of cocaine were committed by defendant, they were committed at Gary Short's residence; all of the evidence was that Gary Short's residence was in North Carolina; and defendant simply denied having gone there or having delivered any white powder to the officer at any location. Although the facts supporting defendant's commission of the offenses were in dispute, the location of the offenses was not an issue.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 20 April 1984 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 27 August 1985.

Defendant was indicted for the felonies of possessing cocaine with intent to sell or deliver and delivery of cocaine. A jury found him guilty of possessing cocaine with intent to deliver and guilty of delivering cocaine. The court consolidated the offenses and imposed an active sentence of ten years. Defendant appeals.

Attorney General Lacy H. Thornburg, by Daniel F. McLawhorn, Assistant Attorney General, for the State.

Hamrick, Mauney, Flowers, Martin and Deaton, by W. Robinson Deaton, Jr. for defendant appellant.

MARTIN, Judge.

Defendant brings forward assignments of error relating to (1) the denial of his motion for a continuance on the grounds that he had not been arraigned, (2) the admission of evidence over his objection, (3) the denial of his motion to examine the undercover officer's notes and (4) the refusal of the court to grant his request for jury instructions regarding jurisdiction. We have considered each of defendant's contentions and find no prejudicial error in his trial.

The State's evidence tended to show that on 10 April 1983 Officer Kenneth Knox, a narcotics detective for the Union County, South Carolina, Sheriff's Department went to the defendant's home which is located just a few miles inside the South Carolina line. Officer Knox was accompanied by Gary Short and Vance

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Head. At the defendant's home Officer Knox inquired about buying a gram of cocaine. The evidence indicates that the defendant told the officer that he did not have any cocaine with him but he could get some and for the officer to give him the money. Officer Knox gave defendant \$110, and defendant told Officer Knox to go to Gary Short's residence and wait for him. There is no dispute that this transaction occurred in South Carolina.

Officer Knox testified that he and Gary Short left defendant's home and went to Mr. Short's residence, which according to Knox's testimony, was located in a mobile home park in Patterson Springs, Cleveland County, North Carolina. Officer Knox stated further that approximately 45 minutes later defendant arrived at the Short residence and handed him a small piece of plastic containing white powder which the officer put in his pocket.

Officer Knox later met with SLED Agent Robert Cogdell and gave him the white powdery substance which Agent Cogdell placed in an envelope, labeled it, and locked it in his briefcase. Agent Cogdell delivered this evidence to the SLED lab in South Carolina. Since the chemist assigned to analyze the evidence was not at the laboratory, Agent Cogdell placed a seal on the envelope, initialed it, and turned the envelope over to Lieutenant Wilson, the chief chemist. Lieutenant Wilson did not testify. Bob Carpenter, the chemist who performed an analysis of the substance, testified that he picked up the evidence envelope from his personal locker to which Lieutenant Wilson also had keys. The seal was intact. Analysis of the white powder indicated that it was cocaine.

Defendant's evidence tended to show that he recalled that Officer Knox, who was known to him as "Big John," had come to his residence with Gary Short on one occasion, but he denied that he had ever agreed to provide "Big John" with cocaine or that he had ever been to Gary Short's residence, although he knew that it was located in Cleveland County. He specifically denied having possessed cocaine on the one occasion when Officer Knox came to his home, or having delivered cocaine to Officer Knox at any location on that date.

[1] By his first assignment of error defendant contends that the trial court erred in denying his motion for continuance, which was made on the ground that he was never arraigned. When the case

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was called for trial on 17 April 1984, defendant's counsel stated that defendant had neither been arraigned nor waived arraignment. The court asked the court reporter what her records indicated and she replied that the notation "WA" appeared on her copy of the 19 March 1984 calendar. She stated that this was her shorthand symbol for "waived arraignment." Defendant offered no materials in support of his motion. Based upon the court reporter's notation, the court found that defendant had waived arraignment.

In *State v. Brown*, 306 N.C. 151, 174, 293 S.E. 2d 569, 584, *cert. denied*, 459 U.S. 1080, 103 S.Ct. 503, 74 L.Ed. 2d 642 (1982), the North Carolina Supreme Court stated the principle concerning arraignment: "The purpose of an arraignment is to allow a defendant to enter a plea and have the charges read or summarized to him and the *failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges.* (Emphasis added.) Defendant did not state that he had not been informed of the charges, indeed from the record there can be no doubt that he was fully aware of them. The court as required by G.S. 15A-1213 summarized the charges to the jury and stated that defendant had entered a plea of not guilty. The absence of formal arraignment, under these circumstances, does not amount to reversible error. *State v. McCotter*, 288 N.C. 227, 217 S.E. 2d 525 (1975); *State v. Riddle*, 66 N.C. App. 60, 310 S.E. 2d 396 (1984). This assignment of error is overruled.

[2] Defendant next assigns error to the trial court's failure to order the State to produce written notes made by Officer Knox. At trial Officer Knox made reference to a statement which he had typed from his notes that he "scribbled" on his way home after meeting with the defendant. Defendant contends that he is entitled to the officer's "scribbled" notes pursuant to G.S. 15A-903(f)(2) which provides: "After a witness called by the State has testified on direct examination, the Court shall, on motion by the defendant, order the State to produce any statement of the witness in the possession of the State that relates to the subject matter as to which the witness has testified."

There is no evidence in the record that the State in the case *sub judice* had the "scribbled" notes in its possession, nor that Of-

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ficer Knox still had them at the time of trial. Officer Knox stated that the typed statement was made from those notes and was the only report that he had. The typed statement was read into evidence, thus it was obviously produced as required by the statute. Absent some showing, by cross-examination or otherwise, that the "scribbled" notes were available to the State, we cannot say that the court's refusal to order their production was error.

[3] The defendant next assigns as error that the evidence was insufficient to establish a proper chain of custody as to the white powder and therefore neither the powder nor the results of its analysis were admissible. This assignment of error is based on the failure of Lieutenant Wilson, head of the SLED lab, to testify. Defendant contends that Lieutenant Wilson's testimony was essential to establish a proper chain of custody. We disagree.

The evidence showed that Agent Cogdell placed a red seal on the envelope containing the white powder, initialed it, and delivered the evidence to Lieutenant Wilson at the SLED lab. Bob Carpenter testified to obtaining this envelope from his personal locker to which Lieutenant Wilson also had a set of keys. He further testified that when he obtained the envelope the red seal was unbroken. We hold this to be evidence sufficient to reasonably support the conclusion that the substance analyzed was the same as that delivered to Lieutenant Wilson by Agent Cogdell. In all other respects the chain of custody was complete. If the evidence is sufficient to reasonably support the conclusion that the substance analyzed is the same as that obtained from defendant, then both the substance and the results of the analysis are admissible. *State v. Karbas*, 28 N.C. App. 372, 221 S.E. 2d 98, *disc. rev. denied*, 289 N.C. 618, 223 S.E. 2d 395 (1976). We also rely upon the holding in *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). In *Detter*, the defendant contended that the State's evidence failed to show which employee had received the evidence from the post office and that once the evidence was placed on the bench at work there was a likelihood of interchange with other similar evidence. The *Detter* court rejected this argument stating that the possibility of interchange was too remote. "Any weakness in the chain of custody relates only to the weight of the evidence and not to its admissibility." *Id.* at 633, 260 S.E. 2d at 588.

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[4] In his final assignment of error, defendant contends that the trial court erred in refusing to give his requested jury instruction regarding jurisdiction. Defendant argues that the jury should have been required to determine if the alleged offenses occurred in North Carolina.

North Carolina follows the majority rule which requires that when jurisdiction is challenged, the State in a criminal case has the burden of proving beyond a reasonable doubt that the crime with which the defendant is charged occurred in this State. *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977). Where the facts on which jurisdiction is based are in issue, the court is required to instruct the jury that the State has the burden of proving jurisdiction. *State v. Darroch*, 305 N.C. 196, 287 S.E. 2d 856, *cert. denied*, 457 U.S. 1138 (1982).

The defendant prior to jury selection objected to joinder of the counts for trial on the grounds that if any sale of cocaine occurred, it occurred in South Carolina. However, defendant was not charged with sale of cocaine in North Carolina, rather he was charged with the offenses of possessing cocaine with intent to deliver and delivery of cocaine. The evidence indicates that if the offenses of possession of cocaine with intent to deliver and delivery of cocaine were committed by defendant, they were committed at Gary Short's residence. All of the evidence discloses that Gary Short's residence was in Cleveland County, North Carolina. Defendant simply denied having gone there or having delivered any white powder to Officer Knox at any location. Thus, we conclude that although the facts supporting defendant's commission of the offenses were in dispute, the fact upon which jurisdiction was based, i.e., the location where the offenses were committed, was not in issue. Therefore, the requested instruction was properly denied. This assignment of error is overruled.

No error.

Judges WEBB and BECTON concur.

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STATE OF NORTH CAROLINA v. ALVIN AVERY HOOD

No. 8425SC1100

(Filed 1 October 1985)

Homicide § 21.7— second degree murder—insufficient evidence

The State's evidence was insufficient to support defendant's conviction of second degree murder where it raised no more than a suspicion or conjecture that a crime was committed or that defendant was the person who committed it and showed only that defendant was in the area of the trailer in which the victim died at the time a shot was fired and that defendant was once heard to express his willingness to shoot the victim.

APPEAL by defendant from *Pope, Judge*. Judgment entered 4 May 1984 in CALDWELL County Superior Court. Heard in the Court of Appeals 20 August 1985.

Defendant was indicted for first degree murder and convicted of second degree murder in the death of his brother-in-law, Leslie Joseph "Joe" Hagaman. Defendant received a prison sentence of twenty years.

The State's evidence tended to show the following facts and circumstances. Hagaman was killed by a gunshot wound to the head from the firing of a .25 caliber bullet. His body, still warm, was found in his house trailer at 8:30 p.m. on Friday, 1 July 1983. Although the deceased kept several different types of guns and ammunition, no weapon of .25 caliber was found in the trailer and there were no open windows or outside doors in the room where the body was found.

The last person to speak with Hagaman was Wilma Taylor, a neighbor across the street, at 11:30 p.m. on the previous evening, June 30. Twenty-one hours passed from that time until the body was found. The State's pathologist was unable to estimate the time of death.

Mrs. Taylor testified that, on the morning of July 1, she heard a car turn into the Hagaman drive and then a male voice calling the name "Joe." Approximately five minutes later she heard a gunshot. About ten minutes after that she heard a car "roaring" by and looked out her living room window to see defendant driving his car away. Mrs. Taylor later testified that

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"they shot quite a bit" over at the Hagaman trailer. Her husband and three sons did not hear the gunshot.

Mr. Taylor, who remained at home for the greater part of that day, testified that he saw Jim Hagaman, Joe's brother, drive up to the trailer around 10:00 a.m., go to the back door, come back around and drive away. Jim testified he had come to visit Joe, but when he saw that the padlock on the outside of the back door was locked, he left.

Deputy Sheriff Joel Cook of the Caldwell County Sheriff's Department went by the trailer at 5:30 p.m. Seeing no vehicles there, he did not stop. He returned at 8:30 p.m. and saw four people: Jeanetta Hagaman, the deceased's estranged wife; Charles Hood, the brother of Jeanetta and defendant; and two friends, Ruby and Colden Crump, coming out of the trailer. The back door was open. Deputy Cook went inside the trailer where he noticed a cold can of beer on the kitchen counter. He then went into a bedroom and found Hagaman's body.

The evidence showed that defendant had been to the Hagaman trailer the previous Wednesday. He had helped Mike Reese, a co-worker of Jeanetta's, remove some pictures and household accessories for her from the trailer. While riding with Reese to take the items to Jeanetta, the two passed Joe Hagaman driving on the highway. Reese testified that at that point defendant showed him a small handgun he carried and said "Well, if he [comes back] I am going to shoot him because he is the type of fellow that will shoot you He is the type fellow that will shoot you and kill you if you come back."

Defendant did not present any evidence.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant.

WELLS, Judge.

In one assignment of error, defendant contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence.

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The evidentiary principles governing motions to dismiss are set out at length in *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Briefly summarized, they are that the evidence must be considered in the light most favorable to the State, with the benefit of all permissible favorable inferences. If the trial judge finds substantial evidence, regardless of weight, of each essential element of the crime, and that defendant committed it, the motion should be denied.

"Substantial evidence" may be defined as "any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it. . . ." *Id.* Though all the evidence against defendant is circumstantial, that fact alone should not bar submission of the case to the jury. The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984).

The defendant argues the possibility that Hagaman committed suicide. Hagaman was killed by a .25 caliber bullet, but no .25 caliber pistol was found anywhere in the vicinity of the body. However, at least four people were known to have been at the open trailer before the investigation was begun. The possibility that Joe Hagaman committed suicide and that his suicide weapon was removed by another party directs the conclusion that the State failed to show that a crime had been committed. This alone is reason to sustain the motion to dismiss. *See State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

Assuming *arguendo* that the State established sufficient evidence for a jury to conclude that Hagaman's death was the result of homicide, we proceed to other important weaknesses in the State's case.

For the most part, the leading cases dealing with motions to dismiss in homicide trials concern scenarios in which the State's evidence tends to show that the defendants had an opportunity to commit the crime, but failed to show the reasonable inference of any motive. *See, e.g., State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977) and *State v. Cutler, supra*. Evidence of either motive or opportunity is not sufficient to carry the case to the jury. *State v.*

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Bell, 65 N.C. App. 234, 309 S.E. 2d 464 (1983), *aff'd*, 311 N.C. 299, 316 S.E. 2d 72 (1984).

In the case *sub judice*, neither motive *nor* opportunity may reasonably be inferred. One witness heard a shot fired in the direction of the Hagaman residence and thereafter identified defendant driving away. Even taking this evidence in the light most favorable to the State, it is not reasonable to infer that defendant had the *opportunity* to commit the crime. There is no evidence that defendant had access to the trailer or that he otherwise gained entrance to it. There is no evidence that defendant was armed or that the deceased was present in the trailer at the time.

A similar logical analysis, when applied to a second witness's testimony of defendant's stated willingness to shoot Hagaman, prohibits any inference that defendant had a *motive* to kill. The context of his statement, that he would shoot Hagaman because "[h]e is the type of fellow that will shoot you . . .," indicates a willingness of defendant to defend himself if confronted by Hagaman in a shooting situation. An intent to initiate a shooting is not evident in defendant's remarks.

In *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924, 98 S.Ct. 402, 54 L.Ed. 2d 281 (1977), the defendant had threatened his ex-wife several times and had tried to find someone whom he could hire to kill her. The door was unlocked at the trailer, where the deceased was shot. The Supreme Court ruled that the State had failed to offer substantial evidence that the defendant was the one who shot his wife.

In *State v. Lee*, 294 N.C. 299, 240 S.E. 2d 449 (1978), defendant had beaten the deceased, his girlfriend, who had admitted to having an affair. He had also threatened to kill her. He was seen with a pistol the day of the shooting. The defendant and the deceased had lived together, and her body was found a few miles from their mobile home. The Supreme Court ruled that, even though the State had produced substantial evidence of the defendant's opportunity and *mens rea* to commit murder, it had not offered substantial evidence which showed that defendant had actually committed the act of murder.

In *State v. West*, slip op. no. 844SC1184 (N.C. App. Sept. 3, 1985), defendant returned to the marital home to confront her

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husband, his girlfriend, and the girlfriend's two-year-old son. The girlfriend hid in a closet but was found by the wife, after which a scuffle ensued. The three adults then left the house with the child remaining inside. The husband and girlfriend returned over two hours later to find the child suffocated. This Court ruled that both women had a motive to kill the child: the girlfriend, to keep the child quiet when she feared discovery by the defendant; and the defendant, out of rage against her husband's infidelity. There was no evidence to show that defendant in fact suffocated the child. This logical gap necessitated a reversal of the judgment.

The above cases were reversed despite the showing by the State that the defendant had a motive and an opportunity to commit the crime. In the instant case, the State has not presented evidence giving rise to a reasonable inference of either motive or opportunity. No one had had any contact with the deceased for twenty-one hours before he was found. The State's pathologist could not estimate a time of death. Although defendant was near the deceased's trailer at 6:30 a.m., the usual entrance to the trailer was seen padlocked on the outside at 10:30 a.m. Four persons were observed departing from the trailer at 8:30 p.m. In essence, the State's evidence tends to show only two occurrences: (1) that Hood was in the area of the trailer at the time a shot was fired; and (2) that he was once heard to express his willingness to shoot the deceased.

Finally, the evidence of the cause of death is ambiguous enough to raise only a suspicion that a crime was actually committed.

The State's evidence in this case raises no more than suspicion or conjecture that a crime was committed or that defendant was the person who committed it. Under such circumstances, it was error to deny defendant's motion to dismiss. *See State v. Davis*, 74 N.C. App. 208, 328 S.E. 2d 11, *disc. rev. denied*, 313 N.C. 510, 329 S.E. 2d 406 (1985) and cases cited and discussed therein.

We do not reach defendant's second argument, which was based on deprivation of due process and right to a speedy trial.

Reversed and vacated.

Chief Judge HEDRICK and Judge PHILLIPS concur.

City of Burlington v. Staley

CITY OF BURLINGTON v. J. J. STALEY AND WIFE, MARY ELIZABETH STALEY

No. 8418SC1232

(Filed 1 October 1985)

1. Eminent Domain § 6.6— value witnesses not required to be experts

Defendant's witnesses were not required to be experts in land appraisal in order to state opinions of the value of the land taken and contiguous lands before and after the taking but were required only to show that they were familiar with the land taken.

2. Eminent Domain § 6.6— value witnesses related to landowners

The fact that two of defendant's witnesses were related to defendants does not go to the admissibility of their value testimony but only to its weight.

3. Eminent Domain § 6.6— reliability of value testimony

There was sufficient evidence presented in a condemnation action for the jury to conclude that defendants' value witnesses were reliable in their testimony even though they were unable to recite specific sales prices of comparable tracts on cross-examination.

4. Eminent Domain § 6.7— highest and best use—testimony not speculation

Testimony by defendants' witnesses that the highest and best use of condemned land was for residential or recreational development was not "totally speculative" where the record contained testimony describing the condition, location and surroundings of the land which could render it available for residential subdivision or recreational development; the evidence indicated that there are residential subdivisions in the vicinity; and plaintiff's expert witness indicated that agricultural land almost always has the potential of selling some lots.

5. Trial § 42.2— compromise verdict not shown

The trial court did not err in denying plaintiff's motion for a new trial in a condemnation action on the ground that the jury reached an improper compromise verdict when it awarded an amount of damages which was between the amount shown by plaintiff's evidence and the amount shown by defendants' evidence where there was sufficient evidence presented to the jury to support its verdict.

6. Eminent Domain § 7.1— references to federal funding—harmless error

In an action to condemn land for a public water supply project, any impropriety in references to federal funding for the water project in two questions asked by defendants' counsel constituted harmless error.

APPEAL by plaintiff from *Hobgood, Hamilton H., Sr., Judge*. Judgment entered 14 July 1984, *nunc pro tunc* 29 June 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 September 1985.

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The City of Burlington instituted this action for the condemnation of property owned by defendants J. J. Staley, and wife, Mary Elizabeth Staley. This condemnation was for the purpose of a public water supply project. Prior to the taking defendants owned a tract of land containing approximately 54.2 acres. The property condemned by the City of Burlington contained an area of approximately 6.2 acres and included the portion of Alamance Creek which ran through defendants' property. After the taking, defendants were left with two parcels of land on each side of the condemned property. The north parcel contained approximately 35 acres. The south parcel contained approximately 13 acres which were left without access due to the taking.

The case was tried solely on the issue of damages. Defendants presented five witnesses who testified that the highest and best use of the land was for residential or recreational development. Their testimony as to the extent of damages ranged from \$176,000 to \$205,000. The City of Burlington offered three witnesses, qualified as experts in real estate appraisal, who testified that the highest and best use of the property was for agricultural purposes and a single residence. Their estimates of damages ranged from \$13,175 to \$18,050.

The jury returned a verdict of \$89,275 for defendants. From the judgment, plaintiff appealed to this Court.

Wishart, Norris, Henninger & Pittman, by Robert J. Wishart and June K. Allison, for plaintiff appellant.

Max D. Ballinger for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in failing to set aside the verdict and grant a new trial because (1) the evidence was insufficient to justify the verdict, (2) the verdict was an improper compromise verdict, and (3) the jury in reaching its verdict disregarded the instructions of the court and instead acted under the influence of passion and prejudice.

Each of these contentions will be addressed in turn, but first it should be noted that a trial judge's ruling on a motion for new trial involves the discretion of the trial judge, and is not reviewable in the absence of manifest abuse of discretion. *Britt v. Allen*,

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291 N.C. 630, 231 S.E. 2d 607 (1977); *City of Winston-Salem v. Rice*, 16 N.C. App. 294, 192 S.E. 2d 9, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 835 (1972).

Plaintiff first contends the evidence at trial was insufficient to justify the jury's verdict. Plaintiff cites the following as support for this contention: (1) defendants' witnesses were not experts in land appraisal; (2) two witnesses were "interested" because of their relationship as son and son-in-law to the defendants; (3) none of defendants' witnesses testified as to any personal knowledge of comparable sales other than one sale of a Girl Scout Camp reported in the newspaper; (4) none of defendants' witnesses had any expertise in residential subdivision or country club development; and (5) the opinion of defendants' witnesses as to the highest and best use of the property was "totally speculative."

[1] We find no merit in plaintiff's contention. Any witness familiar with the land may testify as to his opinion of the value of the land taken and as to the contiguous lands before and after the taking. *Highway Commission v. Privett*, 246 N.C. 501, 99 S.E. 2d 61 (1957); *Highway Comm. v. Frye*, 6 N.C. App. 370, 170 S.E. 2d 91 (1969). Thus, it is not necessary that the witness be an expert, only that he be familiar with the land taken. 1 *Brandis on North Carolina Evidence* § 128 (1982). At trial, defendants' witnesses gave adequate testimony as to their familiarity with the property.

[2] The fact that two of the witnesses were related to the defendants does not go to the admissibility of their testimony, but simply to the weight to be given their testimony by the jury. This fact, absent more, is no ground on which to set aside a jury verdict.

[3] Plaintiff is correct in stating that defendants' witnesses were unable to recite specific sales prices of comparable tracts on cross-examination. However, each witness testified that he was generally familiar with the land and the property values in the community. Further, as plaintiff acknowledges, there was testimony that the newspaper had reported that a Girl Scout Camp on the same Alamance Creek as the condemned property had sold for \$5,000 an acre. Even if the jury failed to believe this testimony presented by defendants, plaintiff's expert witness Jesse Douglas Avent testified that above the Girl Scout Camp

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there had been *several* tracts of land which sold for \$5,000 an acre. Furthermore, plaintiff's expert witnesses agreed with defendants' witnesses that the value of the south 13 acres, which due to the taking now had no access, had been reduced to approximately \$200 to \$300 an acre. In short there was enough evidence presented for the jury to conclude that defendants' witnesses were reliable in their testimony, in spite of their inability to recite specific prices on cross-examination.

Plaintiff is simply incorrect in stating that no witness for the defendants had any expertise in residential subdivision or recreational development. Jimmy Neese testified that he was a licensed contractor who had been in the business for seventeen years and that he had developed a subdivision.

[4] We also disagree that the opinion of defendants' witnesses as to the highest and best use of the property was "totally speculative." The record contains testimony describing the condition, location, and surroundings of the land which could render it available for residential subdivision or recreational development. In fact, evidence indicates that there are residential subdivisions in the vicinity. We further note that plaintiff did not object at any time to defendants' witnesses testifying as to their opinion of the highest and best use of the property. In fact, plaintiff's expert witness Jesse Douglas Avent indicated agricultural land almost always has the potential of selling off some lots. In view of this evidence, we cannot regard the opinion of defendants' witnesses as totally speculative.

The jurors had the opportunity to see and hear the witnesses and to evaluate their respective qualifications to make valuations. The jury is free to believe all, some, or none of a witness's testimony. In our thorough review of the record, we conclude the jury was presented with sufficient evidence to support its verdict. Therefore, the ruling of the trial judge denying the motion for new trial does not rise to the level of abuse of discretion. This assignment of error is without merit.

[5] Plaintiff next contends that the verdict was an improper compromise verdict, and thus a new trial should have been granted. A compromise verdict is one in which the jury answers the issues without regard to the pleadings, evidence, contentions of the parties or instructions of the court. *Vandiford v. Vandiford*,

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215 N.C. 461, 2 S.E. 2d 364 (1939). The jury awarded \$89,275. This amount comports neither with defendants' evidence of \$176,000 to \$205,000 in damages nor plaintiff's evidence of \$13,175 to \$18,050, but it need not be set aside as a compromise verdict simply on that basis. See *McAdams v. Moser*, 40 N.C. App. 699, 253 S.E. 2d 496 (1979). As stated above, we find there was sufficient evidence presented to the jury to support its verdict, and therefore the trial judge did not err in denying the motion for new trial.

In view of our findings, plaintiff's third contention that the jury acted under the influence of passion and prejudice is without merit.

Finally, we consider plaintiff's argument that inappropriate comments by defendants' counsel resulted in a cumulative prejudicial effect and that the trial court erred in failing to grant a mistrial. We find this contention without merit, though we specifically address two points raised by plaintiff.

[6] First, plaintiff maintains that counsel for defendants emphasized that the water project was funded by the federal government. Plaintiff cites the following from the transcript as support.

Q. [Mr. Ballinger, counsel for defendants]: Actually, in effect, what you're saying is the Federal Grant was to take the five hundred and sixty feet above sea level, is that right?

MR. WISHART [Attorney for City of Burlington]: I'm going to OBJECT to the whole line, Your Honor.

THE COURT: Yes, sir, SUSTAINED.

* * * *

Q. This Greater Alamance Water Supply Project is a federally funded project, is that right?

MR. WISHART: OBJECTION.

THE COURT: OVERRULED. Do you know?

A. [Jesse Douglas Avent, witness for City of Burlington]: I don't know for a fact. I think so, but I have—no, I couldn't testify to it.

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Plaintiff asserts that the mention of federal funding in these two questions amounted to prejudicial error. We disagree. We have considered the cases cited from other jurisdictions and find that though the questions may have been improper, the result was simply harmless error. Annot., 19 A.L.R. 3d 694 (1968).

Plaintiff next asserts that defendants' counsel conducted an improper cross-examination by specifically referring to the sales prices of non-comparable properties in his questions. Such questions are improper. *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980). In this case, however, plaintiff's counsel allowed two such questions to be asked and answered before making objection. Counsel then failed to object to a third improper question later in the testimony. It is the well-established rule that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character. *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979); *Moore v. Reynolds*, 63 N.C. App. 160, 303 S.E. 2d 839 (1983); 1 *Brandis on North Carolina Evidence* § 30 (1982). Plaintiff in this instance has waived the benefit of its objection.

Accordingly, plaintiff's motions for new trial and for mistrial were properly denied.

No error.

Chief Judge HEDRICK and Judge COZORT concur.

YOUNG'S SHEET METAL AND ROOFING, INC. v. R. W. WILKINS, JR., COMMISSIONER OF MOTOR VEHICLES

No. 8528SC20

(Filed 1 October 1985)

Constitutional Law § 10.3— motor vehicles—fine for exceeding licensed weight—unconstitutional

The assessment of a fine against plaintiff for operating a vehicle on the highway in excess of its licensed weight violated Art. IV, § 1 of the Constitution of North Carolina where the statutory scheme set forth in G.S. 20-96 and G.S. 20-118 did not provide a penalty for violating the licensed weight limit, leaving that determination in the absolute discretion of the agency. There was no reasonable necessity for giving DMV absolute discretion.

Young's Sheet Metal and Roofing, Inc. v. Wilkins, Comr. of Motor Vehicles

APPEAL by defendant from *Allen (Walter C.), Judge*. Judgment entered 13 November 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 26 August 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General William B. Ray for defendant appellant.

Van Winkle, Buck, Wall, Starnes and Davis by Allan R. Tarleton for plaintiff appellee.

COZORT, Judge.

The plaintiff instituted this action to recover a penalty of \$800.00 which had been assessed against it for operating a vehicle on the highway with a gross weight exceeding the weight for which it was licensed. The statutory scheme set forth in G.S. 20-96 and G.S. 20-118 for assessing and collecting penalties for overweight vehicles did not provide for a penalty to be assessed for a vehicle exceeding its license weight limit. The court granted plaintiff's motion for summary judgment and ordered defendant to repay plaintiff \$800.00. Defendant appeals. We affirm.

The facts of this case are undisputed. On 7 June 1984 an officer with the License, Theft and Weight Enforcement Section of the Division of Motor Vehicles (an agency of the North Carolina Department of Transportation) issued a citation to plaintiff for operating a vehicle on the highways with a gross weight in excess of that allowed under plaintiff's license. The gross weight of the vehicle was 31,900 pounds, while the license for the vehicle permitted a total gross weight of only 20,500 pounds. Under state law, the axle weight limit for this vehicle is 78,000 pounds. Thus, while the vehicle exceeded the weight permitted under its license, it was well under the maximum axle weight limits. The Division of Motor Vehicles (DMV) assessed plaintiff a penalty of \$800.00, which plaintiff paid under protest. Plaintiff demanded in writing a refund of the \$800.00; the demand was refused by DMV. Plaintiff then instituted this action against the Commissioner of DMV to recover the \$800.00 penalty, alleging that plaintiff was "entitled to the refund of its payment for the reason that there is no statute delineating what penalty shall be assessed against an owner whose vehicle shall be found in operation on the highway over the weight for which such vehicle is licensed." After the defendant Commissioner filed an answer denying plaintiff's claim,

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plaintiff moved for summary judgment. The trial court granted plaintiff's motion for summary judgment, ordering defendant to refund the \$800.00, with interest.

G.S. 20-96 requires every owner of a motor vehicle to procure a license in advance to cover the empty weight and maximum load which may be carried. According to the statute in effect in June 1984, any owner failing to do so, and whose vehicle is found over the weight for which it is licensed, "shall pay the penalties prescribed in G.S. 20-118." G.S. 20-118 specifies the maximum weight limits for axles, and prescribes the penalties for exceeding the axle weight limits. There was no penalty provided in G.S. 20-118 for operating a motor vehicle which does not exceed the axle weight limits, but exceeds the license weight.

The question before us is whether DMV could constitutionally fine plaintiff for exceeding the license weight when the statutes did not provide for a specific penalty for that violation.

Article IV, section 1 of the North Carolina Constitution provides: "The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article." Article IV, section 3 provides: "The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice." Administrative agencies must find justification for any authority which they purport to exercise within the General Statutes. *Insurance Co. v. Lanier, Comr. of Insurance*, 16 N.C. App. 381, 192 S.E. 2d 57 (1972).

The concept of delegation of power was explained by our Supreme Court in *Lanier, Comr. of Insurance v. Vines*, 274 N.C. 486, 164 S.E. 2d 161 (1968). In *Vines* the Commissioner of Insurance had fined defendant insurance agent \$3,000.00 for violation of insurance laws. The statute under which the penalty was imposed provided that the Commissioner could impose a penalty

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not to exceed \$25,000.00 for violations of the insurance requirements and regulations in Chapters 57 and 58 of the General Statutes. Speaking for the Court, Justice Lake discussed the separation of powers in the North Carolina Constitution and explained:

The legislative authority is the authority to make or enact laws; that is, the authority to establish rules and regulations governing the conduct of the people, their rights, duties and procedures, and to prescribe the consequences of certain activities. Usually, it operates prospectively. The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative. This is the power which G.S. 58-44.6 purports to confer upon the Commissioner of Insurance, a member of the executive department of the State government. There is, therefore, in this statute no delegation of the legislative power to the Commissioner.

Id. at 495, 164 S.E. 2d at 166. The Court concluded that the determination of the amount of the penalty to be imposed, *i.e.*, the application of the law so as to make the penalty commensurate with the conduct of the insurance agent, is an exercise of judicial power. Under Article IV, section 3 of the North Carolina Constitution, the Legislature may vest judicial power in the Commissioner, but only if it is reasonably necessary. The Court held that it was reasonably necessary to grant the Commissioner the power to revoke a license, hold hearings, and find facts relating to the agent's conduct, but that there was no reasonable necessity for conferring upon the Commissioner the judicial power to impose a penalty which would vary in the Commissioner's discretion.

In the instant case, DMV was given even more discretion than that struck down by our Supreme Court in *Vines*. The statutes made no provisions for the penalties to be assessed for violating the licensed weight limit, leaving that determination in the absolute discretion of the agency. We hold there was no reasonable necessity for conferring absolute discretion in the DMV. Thus, the assessment of the penalty against plaintiff

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violated Article IV, section 1 of the Constitution of North Carolina.

We take judicial notice of the fact that G.S. 20-96 was amended during the 1985 Session of the General Assembly (1985 N.C. Sess. Laws Ch. 116) to provide that violators of G.S. 20-96 would be subject to the specific penalties provided in G.S. 20-118(e)(3), 20-118(e)(1), and 20-118.3.

Summary judgment for plaintiff is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. NATHAN SYLVESTER WALLER

No. 8510SC145

(Filed 1 October 1985)

1. Criminal Law § 74.2— incriminating statement of codefendant—absence of prejudice

The trial court did not violate defendant's G.S. 15A-927 right of confrontation in denying defendant's motion for a mistrial because of the admission of a codefendant's incriminating statement in a joint trial to the effect that the three defendants had been deposited near the crime scene after hitchhiking since (1) defendant's objection to such testimony was actually based on G.S. 15A-910, which sets out possible sanctions for the State's failure to comply with discovery; (2) the court was not required to impose sanctions under this statute; (3) essentially the same testimony was elicited the previous day before the jury was impaneled, and defendant failed to object or make a motion to sever; and (4) even if defendant had made the appropriate objections under G.S. 15A-927, the admission of the testimony was harmless error because other evidence placed defendant at the scene of the crime.

2. Criminal Law § 91— speedy trial—failure to make findings—exclusion of certain periods of time

While the better practice is for the trial court to make findings of fact when ruling on motions to dismiss on speedy trial grounds, the court's failure to make findings does not constitute reversible error when it is apparent that the court determined that the State carried its burden of proof under G.S. 15A-703(a). It is clear that defendant's statutory speedy trial rights were not violated in this case when periods are excluded for time pending a motion for

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voluntary discovery, time pending resolution of defendant's motion for appointment of a fingerprint expert, and the time between defendant's motion to quash the indictments and the date to which the case was continued to permit the State to file new bills of indictment. G.S. 15A-701(b)(1)(d) and G.S. 15A-701(b)(5).

3. Larceny § 6.1— value of stolen truck—testimony by owner—failure to object

While testimony by the owner of a stolen truck as to the price for which he would sell the vehicle was not competent evidence of value for purposes of the larceny statute, such evidence could properly be considered on a motion for nonsuit or to dismiss where defendant failed to object thereto.

4. Criminal Law § 26.5— felonious breaking or entering and felonious larceny pursuant to breaking or entering—no double jeopardy

Defendant's right against double jeopardy was not violated by his convictions for felonious breaking or entering and felonious larceny pursuant to that breaking or entering.

APPEAL by defendant from *Lee, Judge*. Judgments entered 26 July 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 23 September 1985.

Defendant was charged in bills of indictment, proper in form, with one count of felonious breaking or entering, two counts of felonious larceny, and one count of felonious possession of stolen goods. He was convicted of two counts of felonious larceny, one of which was for the larceny of a pickup truck, and one count of felonious breaking or entering. From judgments imposing consecutive sentences of ten years for felonious breaking or entering and larceny and ten years for larceny of a motor vehicle, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General John R. B. Matthis, and Assistant Attorney General Alan S. Hirsch, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

Defendant first contends that the trial court, by denying his motion for mistrial, by admitting testimony as to an incriminatory out of court statement of a co-defendant, and by admitting that testimony without a limiting instruction, violated defendant's constitutional right of confrontation in contravention of G.S. 15A-927.

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[1] Defendant was tried jointly with two co-defendants, one of whom was John Lewis Butler. Officer Michael McDermott testified for the State that he stopped and questioned the three defendants, who were walking along the road near the scene of the crime on the morning of the crime, and that Butler told him that they had hitchhiked from Durham and had just walked across the field from the place where they had been deposited, pointing to the area where the stolen pickup was located and the break-in had occurred.

Defendant contends that he objected to this testimony and moved for a mistrial under G.S. 15A-927, which provides that when a defendant objects to a joint trial because an out-of-court statement of a defendant makes an inadmissible reference to the objecting defendant, the court must require the prosecutor to elect to proceed in a joint trial without admitting the statement, to proceed in a joint trial with the objectionable portions of the statement deleted, or to proceed in separate trials. The transcript reveals, however, that defendant, contending that this statement about their being deposited near the crime scene had not been disclosed during discovery, moved for a mistrial pursuant to G.S. 15A-910, which sets out possible sanctions for the State's failure to comply with discovery. The court is not required to impose any sanction under G.S. 15A-910, and the court's ruling under G.S. 15A-910 is not reviewable absent a showing of an abuse of discretion. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983).

The previous day, before the jury was impaneled, McDermott gave essentially the same testimony regarding Butler's statements. Defendant did not object or make a motion to sever at that time. He thus could not claim surprise when the statement was introduced the next day. We therefore find no abuse of discretion by the court.

Even if defendant had made the appropriate objections under G.S. 15A-927, the admission of the testimony was harmless beyond a reasonable doubt. Defendant contends the testimony was prejudicial because it placed defendant at or near the scene of the break-in. There was other evidence, however, that defendant's footprints, along with the footprints of the other defendants, were found around the stolen pickup truck, and that defendant's fingerprints were found on a U-Haul truck near the shop which had been broken into.

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[2] Defendant next contends that the court erred in denying his motion to dismiss on speedy trial grounds because the State failed to prove certain time periods were excludable under the Speedy Trial Act and the court failed to make findings to support its decision.

While the better practice is for the court to make findings of fact, the court's failure to make findings does not constitute reversible error when it is apparent the court determined the State carried its burden of proof under G.S. 15A-703(a). *See State v. Rogers*, 49 N.C. App. 337, 271 S.E. 2d 535, *disc. rev. denied*, 301 N.C. 530, 273 S.E. 2d 464 (1980). Defendant was indicted on 7 November 1983 to start the running of the speedy trial clock. G.S. 15A-701(a1)(1). On 16 November 1983 defendant filed a motion for voluntary discovery, which was answered by the State on 23 November 1983. This one week period was excludable under the Speedy Trial Act. *State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984). On 19 December 1983 defendant filed a motion for the appointment of an independent fingerprint expert. A hearing on that motion was scheduled for 9 February 1984, but the hearing was continued until 15 March 1984 because defendant's counsel failed to appear for the hearing. On 16 March 1984 the court allowed defendant's motion for the appointment of a fingerprint expert and ordered a continuance until 19 April 1984 in order to allow defendant to employ a fingerprint expert. On 16 April 1984, upon motion by defendant, the court allowed another continuance, until 14 May 1984, for defendant to employ a fingerprint expert. The period from 19 December 1983 until 14 May 1984 was clearly excludable under G.S. 15A-701(b)(1)d, which permits exclusion of the time between the filing of a pretrial motion and the date of the court's final ruling on the motion or the date on which the event causing the delay is finally resolved. In the meantime, defendant filed a motion to quash the indictments on 19 March 1984. The court granted the motion to quash the indictments on 15 June 1984 and on that date entered an order to continue until 23 July 1984 to allow the State to file new bills of indictment. The period from 19 March 1984 until 23 July 1984 was clearly excludable under G.S. 15A-701(b)(1)d and G.S. 15A-701(b)(5). Defendant's case was called for trial on 23 July 1984. The only periods, therefore, which were not excluded by the provisions of G.S. 15A-701(b) were the periods from 7 November 1983 to 16 Novem-

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ber 1983 and from 23 November 1983 to 19 December 1983, periods totalling 35 days, well within the 120 day mandate of the Speedy Trial Act. The State thus carried its burden of proof under G.S. 15A-703(a). The motion to dismiss was therefore properly denied.

[3] Defendant next contends that the court erred in denying his motion to dismiss the charge of felonious larceny for the larceny of the pickup truck because there was no competent evidence as to the value of the pickup truck. When asked for the value of the pickup truck, the truck's owner testified that he "wouldn't have took less than five thousand dollars for it, it was in good shape." While the owner's testimony as to the price for which he would sell the vehicle was not competent evidence of value for the purposes of the larceny statute, *State v. Haney*, 28 N.C. App. 222, 220 S.E. 2d 371 (1975), defendant did not object to the testimony. Since incompetent evidence, if not objected to, may be considered on a motion for nonsuit or to dismiss, the motion to dismiss was properly denied. *Id.*

[4] Defendant's remaining contention is that defendant's convictions for felonious breaking or entering and for felonious larceny pursuant to that breaking or entering violate the double jeopardy clauses of the North Carolina and United States Constitutions. As defendant concedes, this contention has been rejected repeatedly by this Court and will continue to be rejected until the Supreme Court holds otherwise. *State v. Cameron*, 73 N.C. App. 89, 325 S.E. 2d 635 (1985).

We hold defendant received a fair trial, free of prejudicial error.

No error.

Judges BECTON and PARKER concur.

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STATE OF NORTH CAROLINA v. EARNEST NEAL STALLINGS

No. 844SC1323

(Filed 1 October 1985)

Robbery § 4.7— armed robbery—evidence not sufficient

Defendant's motion to dismiss a charge of armed robbery should have been granted where the store clerk testified that she clearly remembered the robber's voice, walk, and eyes, but never positively identified defendant by those characteristics, and where the only evidence linking defendant to clothing articles and a shotgun found near the store after the crime and positively identified by the clerk was that hairs found inside a mask were microscopically consistent with defendant's. The most that could be inferred from the clerk's testimony was that defendant and the robber walked similarly and had blue eyes, and comparative microscopy of hair must be combined with other substantial evidence to take a case to the jury.

APPEAL by defendant from *Stevens, Judge*. Judgment entered 17 August 1984 in Superior Court, ONSLOW County. Heard in the Court of Appeals 28 August 1985.

Defendant appeals his conviction of armed robbery.

Attorney General Thornburg, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Jeffrey S. Miller for the defendant.

EAGLES, Judge.

The dispositive question presented by this appeal is whether the State presented evidence that defendant was the perpetrator of the armed robbery sufficient to withstand defendant's motion to dismiss.

I

The law governing questions of the sufficiency of the evidence in criminal cases is well established. *See State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Bell*, 65 N.C. App. 234, 309 S.E. 2d 464 (1983), *aff'd*, 311 N.C. 299, 316 S.E. 2d 72 (1984) (per curiam). Briefly summarized, the law requires the State in a criminal prosecution to present to the jury substantial evidence of each element of the crime charged and of the accused's identity as the perpetrator. The evidence, direct and cir-

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cumstantial, is taken in the light most favorable to the State in determining its sufficiency; evidence which raises only a suspicion as to the accused's identity does not suffice. While simply stated, these general principles remain difficult to apply.

II

Here the commission of the robbery was not disputed. On the issue of the identity of the perpetrator, the jury heard the following evidence from the State: Ms. King, the store clerk, testified that the robber walked into the store carrying a shotgun, with a mask over his face. She could only see his eyes, which were blue and distinctive. She recognized the robber's voice as one she had heard before. Ms. King testified that defendant was a regular customer. She never positively identified defendant as the robber, however. She testified that defendant's eyes were blue, but failed to identify them as the same distinctive eyes. Ms. King did not match defendant's voice with the robber's. She stated that the robber had an unusual walk, and that defendant had a "similar walk." Ms. King positively identified the clothes and a shotgun found near the store after the crime as those used by the robber. The only evidence tending to link the clothing articles to defendant was that hairs found inside the mask were microscopically consistent with defendant's but not positively identified as being hair belonging to the defendant. (Evidence presented on *voir dire* tended to show that the shotgun had belonged to defendant at an earlier time. This evidence never came before the jury, however.)

III

Ms. King's evidence alone did not suffice to carry the issue of defendant's identity to the jury. Although she testified that she clearly remembered the robber's voice, walk and eyes, she never positively identified defendant by these characteristics despite extensive examination and opportunity. Taking her evidence in the light most favorable to the State, the most that can be inferred is that defendant and the robber walked similarly and had blue eyes. Such limited and equivocal evidence, standing alone, will not withstand a timely motion to dismiss. See *In re Vinson*, 298 N.C. 640, 260 S.E. 2d 591 (1979) (victim testified that accused "looked just like" robber, but expressed doubt elsewhere, "not sure" same boy); *State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977) (sketchy identification; no other circumstances identifying defendant);

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State v. Clyburn, 273 N.C. 284, 159 S.E. 2d 868 (1968) (witness could not "honestly say" that defendants were same men; described them only as one tall and one short, one walked with limp); compare *State v. Perry*, 293 N.C. 97, 235 S.E. 2d 52 (1977) (vague eyewitness identification testimony, but sufficient circumstantial evidence to go to jury).

IV

Neither is the comparative microscopic hair analysis evidence sufficient to carry the case to the jury. Hair analysis evidence is admissible under the broad scope of relevancy in criminal cases. *State v. Hannah*, 312 N.C. 286, 322 S.E. 2d 148 (1984) (relevant "if any logical tendency, however slight" to prove identity). Unlike fingerprint evidence, however, comparative microscopy of hair is not accepted as reliable for positively identifying individuals. Rather, it serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity. See *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982); Annot., 23 A.L.R. 4th 1199 (1983). Our review of the North Carolina cases involving comparative microscopy evidence indicates that it must be combined with other substantial evidence to take a case to the jury. *State v. Hannah*, *supra* (eyewitness and fingerprint evidence); *State v. Green*, *supra* (eyewitness, fingerprint and dental evidence and admissions); *State v. Downes*, 57 N.C. App. 102, 291 S.E. 2d 186, appeal dismissed and disc. rev. denied, 306 N.C. 388, 294 S.E. 2d 213 (1982) (defendant former employee, positive match with weapon). Compare *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975) (positive fingerprint match plus defendant's denial that ever on premises sufficient).

V

We also conclude, by comparison with the totality of the evidence found insufficient in other reported cases, that the sum of the evidence before us does not suffice to raise more than a suspicion or conjecture of defendant's identity as the perpetrator.

In *State v. Bell*, *supra*, defendant was arrested near the scene of a murder near the time of the crime in clothes similar to those worn by a man seen at the scene. He had bloodstains on his clothing, and bloodstains consistent with his type and inconsistent with the victim's were found inside the victim's apartment. De-

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fendant when arrested had keys which fit the victim's door and post office box.

In *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967), the State placed defendant at the scene at or near the time of a murder. Defendant was found covered with blood shortly after that time, and had in his possession a knife covered with human blood.

In *State v. Bass*, 303 N.C. 267, 278 S.E. 2d 209 (1981), a rape victim gave a description approximating defendant's, and defendant's fingerprints were found on an outside window of the victim's house. Defendant admitted being at the house, but testified that he had broken in one month earlier.

In *Bell*, *Cutler* and *Bass*, the court held that the State had presented insufficient evidence of the accused's identity as the perpetrator. Viewing the quantum of evidence in the record before us in light of the facts of *Bell*, *Cutler* and *Bass*, we conclude that the State's evidence in the instant case did not suffice to go to the jury on the identity issue. The evidence merely shows that a person who resembled defendant in two inconclusive particulars robbed a store and that a person with hair microscopically consistent with defendant's hair wore the mask found nearby afterwards. The jury may draw no inference from defendant's failure to testify. Defendant's motion to dismiss should have been allowed.

Accordingly, defendant's conviction for armed robbery is
Reversed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. DARYL W. HENSLEY

No. 8417SC1326

(Filed 1 October 1985)

1. Criminal Law § 86.2— cross-examination of defendant—prior convictions over ten years old—harmless error

The trial court erred in allowing the State to cross-examine defendant concerning four convictions more than ten years old where the court failed to

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make findings regarding the specific facts and circumstances which demonstrate that the probative value of such evidence outweighs the prejudicial effect as required by G.S. 8C-1, Rule 609(b). However, such error was not reversible error where defendant was properly impeached with evidence of seven other convictions before the State brought up the inadmissible convictions.

2. Criminal Law § 26.5— breaking or entering and larceny pursuant to breaking or entering—no double jeopardy

Conviction of defendant for breaking or entering and for felonious larceny pursuant to the breaking or entering did not violate defendant's right against double jeopardy.

3. Criminal Law § 138— use of same evidence for two aggravating factors

Where the trial court found the statutory aggravating factor that defendant had prior convictions for offenses punishable by more than sixty days confinement and also found nonstatutory aggravating factors relating to specific prior offenses, defendant is entitled to a new sentencing hearing since it is impossible to determine whether the trial court increased defendant's sentence by considering the same evidence for two different aggravating factors in violation of G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Hairston, Judge*. Judgment entered 19 July 1984 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 16 September 1985.

Defendant was charged in a proper bill of indictment with felonious breaking or entering, felonious larceny, and felonious possession of stolen goods. The State's evidence tends to show that defendant, accompanied by a girlfriend, broke into a house while the owner was on vacation and took \$4,705 worth of personal property. Defendant testified that his girlfriend committed the larceny, and that she testified against him pursuant to an arrangement that exempted her from prosecution. The jury found defendant guilty of felonious breaking or entering and felonious larceny. The trial court sentenced defendant to two consecutive seven year terms. Defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General John F. Maddrey, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Leland Quintin Towns, for defendant, appellant.

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HEDRICK, Chief Judge.

[1] Defendant first contends that the trial court erred in allowing the State to impeach him on cross-examination with evidence of convictions more than ten years old. The State impeached defendant with evidence of two breaking and entering convictions and two larceny convictions that were thirteen years old at the time of his trial. Defendant served a sentence of "[a]bout seventeen months" for the thirteen-year-old convictions. G.S. 8C-1, Rule 609, provides in part:

(a) *General rule.*—For the purpose of attacking the credibility of a witness, evidence that he had been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.

(b) *Time limit.*—Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

At the close of the State's case and before defendant presented any evidence, the State delivered to defendant's counsel a written notice of intent to cross examine defendant concerning his thirteen-year-old convictions if he testified. The trial court found that these convictions were for "dishonesty type things," that they were probative of defendant's credibility, and that they would not prejudice defendant.

Defendant argues that the State's impeachment of him with the thirteen-year-old convictions violated G.S. 8C-1, Rule 609(b), for several reasons. First, he argues that the written notice was not delivered a sufficient time in advance since it was given during trial rather than prior to trial. Second, he argues that the

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notice was not sufficient in content since it did not specify the nature of the offenses or the date and jurisdiction in which the convictions were rendered. However, at trial and in his assignment of error defendant objected to the old convictions only on the ground that their prejudicial effect outweighed any probative value. Therefore his arguments concerning the sufficiency of the notice he received were not properly preserved for appellate review, N.C.R. App. Proc., Rule 10, and this Court will not consider them. In any event, as discussed below, any errors in the admission of evidence of defendant's old convictions was not so prejudicial as to be reversible.

Defendant argues that the trial court erred in allowing him to be impeached with thirteen-year-old convictions under G.S. 8C-1, Rule 609(b), because (1) the trial court failed to support its findings on the impeachment evidence with specific facts and circumstances, and (2) the trial court failed to weigh the appropriate factors regarding the impeachment evidence. We agree that the trial court's findings with regard to the admissibility of the thirteen-year-old convictions were inadequate. This error renders it impossible for this Court to determine whether the trial court weighed appropriate factors.

G.S. 8C-1, Rule 609(b), requires the trial court to determine "that the probative value of the conviction [more than ten years old] supported by specific facts and circumstances substantially outweighs its prejudicial effect." We interpret this part of Rule 609(b) to mean that the trial court must make findings as to the specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect. For example, it would be relevant if the old convictions involved crimes of dishonesty, if they were part of a continuous pattern of behavior, and if they were crimes of a different type from that for which defendant was being tried. In the present case the trial court only made a conclusory finding that the evidence would attack defendant's credibility without prejudicial effect. This finding does not satisfy the "specific facts and circumstances" requirement of Rule 609(b).

The trial court's failure to make specific findings as to why the evidence in this case was so probative and of such little prejudice that it could be admitted as a rare exception to the general time limit stated in Rule 609(b) is not reversible error. The

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transcript reveals that defendant was properly impeached with evidence of seven other convictions before the State brought up the thirteen-year-old breaking and entering and larceny convictions. Although the seven properly admitted convictions were for crimes of a violent nature rather than deceitfulness, they so clearly established defendant's character as a lawbreaker that the additional thirteen-year-old convictions could not have appreciably worsened the jury's view of his credibility. G.S. 15A-1443(a). This assignment of error is overruled.

[2] Defendant contends that his conviction for breaking or entering in the present case must be vacated under double jeopardy principles because it is a lesser included offense of his conviction for felonious larceny pursuant to a breaking or entering. Defendant did not properly preserve this argument for appellate review as there is no exception and no assignment of error for it. N.C.R. App. Proc., Rule 10. We further note that the substance of this argument has been consistently rejected by this Court. *State v. Richardson*, 70 N.C. App. 509, 514, n. 1, 320 S.E. 2d 900, 903, n. 1 (1984); *State v. Edmondson*, 70 N.C. App. 426, 320 S.E. 2d 315 (1984); *State v. Downing*, 66 N.C. App. 686, 311 S.E. 2d 702 (1984), *aff'd in part on other grounds and rev'd in part on other grounds*, 313 N.C. 164, 326 S.E. 2d 256 (1985); *State v. Smith*, 66 N.C. App. 570, 312 S.E. 2d 222, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 708 (1984). We adhere to this line of precedent in the present case.

[3] Defendant lastly contends that the trial court sentenced him to a greater than presumptive term on the basis of improper aggravating factors. For defendant's larceny conviction, the trial court found the statutory aggravating factor that he had prior convictions for criminal offenses punishable by more than 60 days confinement. It also found as nonstatutory aggravating factors that defendant was convicted of assault on a female on 15 March 1982, and assault on a female and delay and obstruction of an officer on 9 June 1982. For defendant's breaking and entering conviction, the trial court again found the statutory aggravating factor of prior convictions. It also found as nonstatutory aggravating factors that defendant was convicted of forcible trespass on 21 December 1983 and of assault on a female on 20 September 1982.

G.S. 15A-1340.4(a)(1) states that "the same item of evidence may not be used to prove more than one factor in aggravation."

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This proscription was violated in a case where the trial court found the statutory aggravating factor of prior convictions and then found as an additional factor that the defendant had been previously convicted of rape. *State v. Brown*, 312 N.C. 237, 250, 321 S.E. 2d 856, 863-64 (1984). Likewise, this Court has held that it was error to find that a defendant served a prison sentence for a prior conviction in addition to finding that he had a prior conviction. *State v. Isom*, 65 N.C. App. 223, 229-30, 309 S.E. 2d 283, 287-88 (1983). The legislated factor of a prior conviction subsumed the additional nonstatutory factor. *Id.* Similarly, the finding of prior convictions in the present case subsumes the trial court's additional findings with regard to specific prior convictions. It is impossible for us to determine whether the trial court increased defendant's sentences by considering the same evidence for two different aggravating factors.

No error in the trial; remanded for resentencing.

Judges ARNOLD and COZORT concur.

BILL MAYES AND WIFE, ELIZABETH MAYES AND CAMP DEERWOODE, INC.
v. JACK TABOR AND WIFE, JOYCE TABOR

No. 8429SC1230

(Filed 1 October 1985)

1. Nuisance §§ 1, 7— hog farm—injunctive relief—balancing of utility and harm required

The trial court erred in an action to enjoin a hog farming operation as a nuisance by concluding that the hog farm was operated without negligence in an agricultural area and denying injunctive relief without balancing the utility of the defendants' conduct against the gravity of harm to plaintiffs.

2. Nuisance § 1.1; Agriculture § 8— hog farm—action not based on changed conditions and locality

The trial court did not err in an action to enjoin a hog farming operation as a nuisance by denying defendants' motion for summary judgment, which was based on the statutory provision that an agricultural operation which was not a nuisance when it began cannot become a nuisance due to changed conditions in the locality after it has been in operation for more than one year. Plaintiffs' nuisance action was not based on changed circumstances in the locality; their summer camp has been in existence for sixty years. G.S. 106-700, G.S. 106-701.

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APPEAL by plaintiffs from *William H. Freeman, Judge*. Order entered 7 September 1984 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 17 May 1985.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt, for plaintiffs appellants.

Potts & Chitwood, by Jack H. Potts, for defendant appellees.

BECTION, Judge.

This appeal involves a nuisance action to enjoin a hog-farming operation.

Camp Deerwoode, a private summer camp for boys, has been in operation near Brevard for approximately sixty years. The present owners, Bill Mayes and his wife, Elizabeth Mayes, purchased the 166-acre camp nineteen years ago. The defendants, Jack Tabor and his wife, Joyce Tabor, purchased the adjoining eighty to eighty-five acre tract about fifteen years ago. There, the Tabors began raising hogs.

In November 1982, the Mayeses filed a nuisance action against the Tabors, alleging that the Tabors were confining three hundred to five hundred hogs in unsuitable sheds within ten feet of the Mayeses' property line; that the stench from the hogs created "an immediate, substantial and unreasonable harm" to the use and enjoyment of their land; and that the hog operation constituted a nuisance. The Mayeses asked the trial court for temporary and permanent injunctive relief as well as compensatory damages. The Tabors filed an answer and a motion for summary judgment, based on N.C. Gen. Stat. Secs. 106-700 and -701 (Supp. 1983).

The trial court granted a preliminary injunction, requiring the Tabors to move their hog operation one hundred feet farther from the Mayeses' property line during the summer months. In March 1984, the trial court modified the preliminary injunction to eliminate the previously-ordered summer move in anticipation of a June 1984 hearing. In June 1984 the trial court denied the Tabors' motion for summary judgment. After a hearing on the merits in July 1984, the trial court, in a 7 September 1984 order, denied the Mayeses permanent injunctive relief. The Mayeses appeal.

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The Mayeses assign error to the denial of injunctive relief, the language of the signed order, and the sufficiency of the evidence to support the finding of fact regarding the operation of the hog farm. The Tabors cross-assign error to the denial of their motion for summary judgment. In the 7 September 1984 order, the trial court applied incorrect criteria in denying injunctive relief. We therefore reverse in part and remand the matter to the trial court for further proceedings consistent with this decision. Otherwise, we find no error.

I

[1] In its September 1984 order the trial court found, in pertinent part:

4. That the [hog farm] operation is properly maintained and run and is not negligently operated.

and concluded:

1. That the Defendants' operation constitutes a nuisance to the plaintiff.

2. That the uses to which the Defendant is subjecting his land is not unreasonable.

3. That balancing the surrounding areas and the manner and condition of the hog farm, it does not constitute an abatable nuisance.

4. That the request for injunctive relief by the Plaintiff, be and the same is hereby dismissed.

A private nuisance action may arise from the defendant's intentional and unreasonable conduct or it may be grounded in negligence. *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977); Restatement (Second) of Torts Sec. 822 (1979); see Prosser and Keeton on the Law of Torts Sec. 87, at 622-23 (W. Keeton 5th ed. 1984) (elements of intentional nuisance). Here, the trial court eliminated the negligence theory with its fourth finding of fact. Since we find sufficient evidence to support this finding, it is conclusive on appeal. Therefore, we must apply the law of intentional private nuisance in evaluating plaintiffs' claim for injunctive relief.

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The degree of unreasonableness of the defendants' conduct determines whether damages or permanent injunctive relief is the appropriate remedy for an intentional private nuisance. Unreasonable interference with another's use and enjoyment of land is grounds for damages. *Pendergrast v. Aiken*; see *Kent v. Humphries*, 303 N.C. 675, 281 S.E. 2d 43 (1981). To award damages, the defendant's conduct, in and of itself, need not be unreasonable. Prosser, *supra*, Sec. 87, at 623. In contrast, injunctive relief requires proof that the defendant's conduct itself is unreasonable; the gravity of the harm to the plaintiff must outweigh the utility of the conduct of the defendant. *Pendergrast v. Aiken*. "[I]t is necessary to show that defendant's conduct in carrying on the activity at the place and at the time the injunction is sought is unreasonable." Prosser, *supra*, Sec. 88A, at 631 (footnote omitted). The *Pendergrast* Court set forth the criteria for injunctive relief:

Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. . . . Determination of the gravity of the harm involves consideration of the extent and character of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence. Determination of the utility of the conduct of the defendant involves consideration of the purpose of the defendant's conduct, the social value which the law attaches to that purpose, the suitability of the locality for the use defendant makes of the property, and other relevant considerations arising upon the evidence.

293 N.C. at 217, 236 S.E. 2d at 797 (citations omitted); see also Prosser, *supra*, Sec. 89, at 640-41.

Reviewing the trial court's conclusions of law, we note that the court failed to apply the *Pendergrast* criteria. It is not enough simply to conclude, as did the trial court, that the Tabors non-negligently operated their hog farm in an agricultural area. *Pendergrast* requires the trial court to balance the utility of the Tabors' conduct against the gravity of the harm to the Mayeses.

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The trial court, therefore, erred in denying the Mayeses injunctive relief.

II

[2] We turn to the Tabors' cross-assignment of error. The Tabors contend that they were entitled to summary judgment, based on G.S. Secs. 106-700 and 701. We disagree. Neither the policy reasons stated in G.S. Sec. 106-700 nor the language of G.S. Sec. 106-701 supports the Tabors' argument. Under G.S. Sec. 106-701, an agricultural operation that was not a nuisance when it began cannot become a nuisance due to "changed conditions in or about the locality thereof after the same has been in operation for more than one year" The Mayeses' nuisance action is not based on "changed circumstances in or about the locality" as this phrase is intended by the statute. This is not a case in which the non-agricultural use extended into an agricultural area. Camp Deerwoode has been in existence for sixty years.

III

In light of the holding in I, *supra*, we need not address the Mayeses' remaining assignment of error.

In summary, we reverse in part and remand this case to the trial court for a determination of the propriety of injunctive relief.

Reversed in part and remanded.

Judges PHILLIPS and EAGLES concur.

STATE OF NORTH CAROLINA v. ZEB JACKSON BLALOCK

No. 8514SC80

(Filed 1 October 1985)

1. Assault and Battery § 13.1; Criminal Law § 34.7— competency of evidence of prior assaults and ill will

In a prosecution for felonious assault, evidence of defendant's prior assaults on the victim and other members of his family was relevant and competent to show his intent or motive, and evidence of ill will between the victim

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and defendant was relevant and competent to rebut defendant's testimony that the victim was the aggressor and that he stabbed the victim in self-defense. G.S. 8C-1, Rule 404(b).

2. Criminal Law § 138—aggravating factor—additional wounds

Evidence of the first and near fatal wound to the victim's abdomen was sufficient to sustain defendant's conviction for assault with a deadly weapon inflicting serious injury, and evidence that defendant inflicted two additional wounds upon the victim thus could be considered in sentencing without violating the proscription against use of evidence necessary to prove an element of the offense.

3. Criminal Law § 138—aggravating factor—heinous, atrocious or cruel assault

The trial court properly found as an aggravating factor that an assault with a deadly weapon inflicting serious injury was especially heinous, atrocious or cruel where the perpetrator of the offense was the victim's father; the victim was stabbed with a large knife two more times than necessary to constitute the offense; the victim lost a considerable amount of blood and underwent surgery, during which his blood pressure dropped and his pulse stopped on two occasions; and partial paralysis which probably will be permanent resulted from one of the wounds.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 12 July 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 19 September 1985.

Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show the following:

The victim, defendant's son, was reading by the kitchen light when defendant entered the kitchen. The victim noticed a butcher knife in defendant's pocket.

After preparing his dinner defendant turned off the kitchen lights. Immediately thereafter the victim walked over to the light switch and turned on the living room lights. When he turned around the victim noticed that defendant was standing directly behind the chair the victim had just vacated.

After arguing with the victim about the lights defendant went into his room and closed the door. The victim went into his own room and put his blackjack in his pocket. He then went back downstairs, entered defendant's room, and asked defendant what his problem was. When defendant did not respond the victim proceeded to probe defendant's person seeking the knife. When the victim moved away from defendant, defendant plunged the knife

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into the victim's abdomen. While the victim was attempting to flee, defendant stabbed him further in the arm and groin.

Numerous altercations had occurred between the victim and defendant and between defendant and other members of his family.

Defendant testified as follows:

He had a butcher knife in his pocket because he had used it earlier in slaughtering hogs. He turned off the kitchen lights because they tended to shine under his bedroom door. He denied that he crept up behind the victim's chair after turning off the lights. When the victim entered defendant's room he kept his left hand hidden behind his hips. When the victim reached for defendant with his right hand defendant pushed him against the door and stabbed him. One or two weeks prior to the incident he and the victim fought and the victim threatened to kill him.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. From a judgment of imprisonment, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General William N. Farrell, Jr., for the State.

Clayton, Myrick & McClanahan, by Jerry B. Clayton and Ronald G. Coulter, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in admitting evidence of his prior acts of violence against the victim and other members of his family. He argues that this evidence was irrelevant and highly prejudicial and that it did not fall within any of the recognized exceptions to the general rule excluding evidence of unrelated offenses in a prosecution for a particular offense.

The general rule is that evidence of other unrelated offenses is not admissible to prove the character of a defendant in order to show that he acted in conformity therewith. N.C. Gen. Stat. 8C-1, Rule 404(b); *see State v. McClain*, 240 N.C. 171, 174, 81 S.E. 2d 364, 365-66 (1954) (pre-Rules). Such evidence may be admissible for other purposes, however, "such as proof of motive, opportunity,

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intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. 8C-1, Rule 404(b); see *McClain* at 175-76, 81 S.E. 2d at 366-67; *State v. Smith*, 61 N.C. App. 52, 57, 300 S.E. 2d 403, 407 (1983) ("proof of independent crimes is competent to show *quo animo*, intent, design, guilty knowledge or scienter, or to make out the *res gestae*").

Here the evidence of defendant's prior assaults on the victim and other members of his family was relevant and competent to show his intent or motive. The evidence of ill will between the victim and defendant was relevant and competent to rebut defendant's testimony that the victim was the aggressor and that he stabbed the victim in self-defense. We thus hold that the evidence was properly admitted.

Defendant contends the court erred in finding as an aggravating factor that the offense was especially heinous, atrocious, or cruel. See N.C. Gen. Stat. 15A-1340.4(a)(1)(f). He argues (1) that the evidence used to prove this factor was necessary to prove an element of the offense, (2) that the torture or excessive brutality necessary to render the offense especially heinous, atrocious or cruel was not shown, and (3) that the finding of this factor resulted in a sentence based on non-statutory and impermissible factors.

"Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation" N.C. Gen. Stat. 15A-1340.4(a)(1); see *State v. Massey*, 62 N.C. App. 66, 69, 302 S.E. 2d 262, 264, *modified and affirmed*, 309 N.C. 625, 308 S.E. 2d 332 (1983). One act constituting an offense suffices to sustain a conviction, however, and repeated instances of the offense may properly be considered an aggravating circumstance. *State v. Abee*, 308 N.C. 379, 381, 302 S.E. 2d 230, 231 (1983). "Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious, or cruel." *State v. Blackwelder*, 309 N.C. 410, 413 n. 1, 306 S.E. 2d 783, 786 n. 1 (1983); see also *State v. Thompson*, 309 N.C. 421, 422 n. 1, 307 S.E. 2d 156, 158 n. 1 (1983).

[2] Here evidence of the first and near fatal wound to the victim's abdomen was sufficient to sustain the conviction for as-

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sault with a deadly weapon inflicting serious injury. The evidence that defendant inflicted two additional wounds upon the victim, one of which could have been fatal, was not evidence necessary to prove an element of the offense. It thus could be considered in sentencing without violating the proscription against use of evidence necessary to prove an element of the offense. *Blackwelder, supra; Thompson, supra.*

[3] In determining whether an offense is especially heinous, atrocious, or cruel, "the focus should be on whether the facts . . . disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *Blackwelder* at 414, 306 S.E. 2d at 786. The presence of multiple acts of the same offense is relevant in determining the question. *Id.* at 413 n. 1, 306 S.E. 2d at 786 n. 1.

The perpetrator of the offense here was the victim's father. This in itself rendered the offense dehumanizing beyond the normal. In addition the victim was stabbed with a large knife two times more than necessary to constitute the offense. As a result he lost a considerable amount of blood and underwent surgery, during which his blood pressure dropped and his pulse stopped on two occasions. Partial paralysis which probably will be permanent resulted from one of the wounds. We hold these facts sufficient to establish brutality, pain, suffering and dehumanization beyond the norm for the offense.

The final prong of this argument, *viz.*, that the finding of this factor resulted in a sentence based on non-statutory and impermissible factors, is also without merit. That an offense "was especially heinous, atrocious, or cruel" is a statutory aggravating factor, N.C. Gen. Stat. 15A-1340.4(a)(1)(f); application of the foregoing authorities to the evidence presented establishes that it was permissibly found here.

No error.

Judges WELLS and PHILLIPS concur.

Brown v. Brown

JOANN BROWN, PLAINTIFF v. D. T. BROWN, JR., ORIGINAL DEFENDANT, AND
PAUL G. BROWN AND GLADYS BROWN, ADDITIONAL DEFENDANTS

No. 8524DC58

(Filed 1 October 1985)

Appeal and Error § 6.2— equitable distribution—interlocutory appeal—dismissed

Plaintiff's appeal was dismissed as interlocutory where she had filed an action for equitable distribution and added her brother-in-law and his ex-wife as additional defendants with allegations that property not titled in her husband's name was subject to equitable distribution because it had been purchased with funds from a company in which plaintiff's husband and his brother-in-law were equal partners; the trial court refused to admit an affidavit from plaintiff and refused her motion to produce documents; the court ordered plaintiff's *lis pendens* canceled; partial summary judgment was granted for the brother-in-law; and the trial court did not certify that there was no just cause for delay. Exceptions which may later be assigned as error provide adequate protection of plaintiff's rights as to the court's ruling on her motion to produce documents and the refusal to admit her affidavit; the possibility of waste or encumbrance of the property is not a clear loss of a substantial right; and avoidance of a rehearing to redivide the marital property if this property is subject to equitable distribution is not a substantial right warranting immediate appeal. G.S. 1A-1, Rule 54(b), G.S. 1-277, G.S. 7A-27.

APPEAL by plaintiff from *Lyerly, Judge*. Orders entered 17 August 1984 in District Court, WATAUGA County. Heard in the Court of Appeals 16 September 1985.

On 13 January 1982 plaintiff appellant, JoAnn Brown, instituted this action against her husband, D. T. Brown, Jr., seeking equitable distribution and other relief. Plaintiff later sought and obtained an order adding as additional defendants her brother-in-law, Paul G. Brown, and his ex-wife, Gladys Brown. In her amended complaint, plaintiff alleged that certain property not titled in her husband's name had been purchased with partnership funds from Brown Brothers Construction Company, a business in which D. T. Brown and Paul G. Brown are equal partners. Plaintiff claimed that this property which was acquired by Paul G. Brown and titled in his name, or in his name and that of his ex-wife, or titled in his name and that of third parties was subject to equitable distribution. *Lis pendens* were filed by plaintiff against all alleged marital property.

Subsequently, Paul G. Brown, appellee, filed a motion for summary judgment. Problems with discovery soon developed and

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plaintiff filed a Motion for Production of Documents. The trial judge denied this motion and entered a Protective Order limiting plaintiff's scope of discovery. On 17 August 1984, the trial judge entered partial summary judgment for Paul G. Brown finding that property titled in the name of Gladys Brown, Paul G. Brown, and Paul G. Brown and third parties was exempt from plaintiff's equitable distribution claim. The trial judge also signed an additional Order on that day cancelling plaintiff's lis pendens on such property which had been determined as a matter of law not to be marital property. From these orders, plaintiff appealed.

McElwee, McElwee, Cannon & Warden, by William H. McElwee, III and William C. Warden, Jr., for plaintiff appellant.

Howell & Peterson, by Allen J. Peterson, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court erred by 1) refusing to admit her affidavit into evidence at the summary judgment hearing, 2) canceling her notices of lis pendens, 3) denying her Motion for Production of Documents, and 4) granting partial summary judgment for Paul G. Brown. Appellee has made a motion to dismiss plaintiff's appeal as premature and frivolous. We deal first with this issue.

Basically, the right to appeal is available through two channels. 54(b) of the Rules of Civil Procedure allows appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason for delaying the appeal. *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980).

In examining plaintiff's right to an appeal by way of Rule 54(b), we note that the orders in the present case are interlocutory in nature since further action is required by the trial court to determine the entire controversy. These orders are not final as to all claims or parties. *See Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). *See also Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980). Plaintiff argues that the present appeal is proper under Rule 54(b) because the specific action by

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the trial court is final as to all land titled in the names of Gladys Brown, Paul G. Brown, and Paul G. Brown and third parties. Assuming *arguendo* that plaintiff's contention has merit, her appeal is still untimely because the trial court did not certify the action for appeal by finding that there was "no just reason for delay." Rule 54(b) expressly requires that this determination be stated in the judgment itself. *Leasing Corp.* at 171, 265 S.E. 2d at 247. In the case *sub judice*, the trial judge made no such declaration in the judgment. Through Rule 54(b), no appeal lies.

The second channel to an appeal is by way of G.S. 1-277 or G.S. 7A-27. An appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. See *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983). Since Rule 54(b) affords plaintiff no appeal, a substantial right must be affected in order for plaintiff to avoid a ruling that her appeal is premature.

Courts recently have taken a restricted view of the substantial right exception. See *Blackwelder* at 334, 299 S.E. 2d at 780. A right is substantial only when it "will *clearly* be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Blackwelder* at 335, 299 S.E. 2d at 780 (emphasis added). Plaintiff fails to show a right which will clearly be lost or affected if immediate review is denied.

Plaintiff contends that the trial court's ruling on her motion to produce documents and the court's refusal to admit plaintiff's affidavit into evidence warrant immediate review. We hold that they are not substantial rights. Protection of these rights is adequately supplied by exceptions which may then be assigned as error on later appeal. See *Terry's Floor Fashions v. Murray*, 61 N.C. App. 569, 300 S.E. 2d 888 (1983).

Plaintiff also contends that her alleged right to property titled in the names of Paul G. Brown, his ex-wife, and Paul G. Brown and third parties, amounts to a substantial right which would be lost if not reviewed before final judgment. Such is not the case. There is the chance, as with all property, of waste or encumbrance. This, however, is not enough to establish the loss of a substantial right. The requirement is not one of possibilities but one of definite loss. In the case *sub judice*, there is no clear loss of a substantial right which would be caused by rejection of this early appeal.

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It is true that if the property in question is found later on appeal to be subject to plaintiff's equitable distribution claim that this property must be added to the marital pie and a redivision of the marital property must occur. This point, however, is not determinative of the issue at hand. The avoidance of a rehearing is not a substantial right warranting immediate appeal. *Blackwelder* at 335, 299 S.E. 2d at 780. There is no substantial right involved in the present case.

The rules concerning appeal are intended to "prevent fragmentary and premature appeals that unnecessarily delay the administration of justice. . . ." *Bailey* at 209, 270 S.E. 2d at 434. They are designed to allow the trial court to fully dispose of a case before an appeal can be heard. *Id.* There is no appeal available to plaintiff through either channel discussed above. We return this case to the trial court for determination of the entire controversy.

Appeal dismissed.

Chief Judge HEDRICK and Judge COZORT concur.

WAYNE D. BURRIS AND WIFE, AVANELLE O. BURRIS, FREDERICK L. JOSEPH, FRANK THOMAS, AND THOMAS A. THOMAS, JR. v. LUTHER SHUMATE AND CARL SHUMATE

No. 8523DC5

(Filed 1 October 1985)

Trespass to Try Title § 4.1— location of property on the ground—sufficient evidence

In an action to enjoin the cutting of timber in which defendant claimed title to the land in question, evidence of defendant's deed and testimony by defendant, his surveyor and the son of a former owner sufficiently located the property on the ground by survey in accordance with the calls and description in defendant's deed so as to permit defendant's claim of title to be submitted to the jury.

APPEAL by defendant from *Osborne, Judge*. Judgment entered 25 July 1984 in District Court, WILKES County. Heard in the Court of Appeals 23 August 1985.

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Plaintiffs instituted this action on 29 October 1982 seeking injunctive relief and damages for timber unlawfully cut from a twenty-two (22) acre tract plaintiffs alleged that they own located in Union Township. Plaintiffs secured a temporary restraining order against defendants cutting and removing timber from the land. Defendants filed answer denying plaintiffs' allegations of title. Defendants counterclaimed seeking damages for wrongful restraint of their cutting timber. Defendant Luther Shumate also counterclaimed seeking to have himself adjudged the owner of the land in question. He alleged ownership under (1) record title pursuant to G.S. 47B-2, (2) adverse possession under color of title, and (3) adverse possession for more than twenty (20) years. Plaintiffs filed reply denying all pertinent allegations of the counterclaim.

The case was tried before a jury. At the close of all the evidence the trial judge held that plaintiffs and defendant Luther Shumate established sufficient chain of title under the Marketable Title Act, but neither plaintiffs nor defendant Luther Shumate sufficiently located their property on the ground by survey in accordance with the calls and descriptions of their deeds in a manner sufficient for a jury to be able to determine the location of any of the tracts on the ground. The court granted a directed verdict for defendants against the plaintiffs' claims and a directed verdict for the plaintiffs against the defendants' claims. From the granting of the directed verdicts plaintiffs and defendant Luther Shumate appealed.

Plaintiffs failed to perfect their appeal and upon defendant's motion pursuant to Rule 13(c), N.C. Rules of Appellate Procedure, plaintiffs' appeal has been dismissed. Although plaintiffs and defendant Luther Shumate presented evidence in their effort to locate the property on the ground by survey in conformity with the descriptions in their deeds respectively, the issue of the sufficiency of plaintiffs' evidence is not before us in light of the dismissal of the plaintiffs' appeal. We therefore limit our discussion of the case as it relates only to defendant Luther Shumate's (hereinafter Shumate) appeal.

Brewer and Freeman, by Paul W. Freeman, Jr., for defendant appellant.

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JOHNSON, Judge.

The pivotal question we must decide is whether defendant Luther Shumate presented sufficient evidence as to his counterclaim to withstand plaintiffs' motion for directed verdict. The inherent purpose of G.S. 1A-1, Rule 50(a) motion for directed verdict is to ". . . test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs. . . ." *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E. 2d 193, 194 (1982). When passing on a motion for a directed verdict "the plaintiff should be given the benefit of all reasonable inferences; . . . the motion should be denied if there is a scintilla [of evidence] to support plaintiffs' prima facie case in all its constituent elements." *Wallace v. Evans, supra*, at 146, 298 S.E. 2d at 194. These principles are equally applicable to defendants' counterclaim. *See, Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971).

In undertaking to prove title to the land from which the timber was cut, the evidence when viewed in the light most favorable to Shumate tended to show that Shumate's surveyor located on the ground the twenty-two (22) acre tract as described in his deed. During the trial, Shumate offered his deed and testimony to show that he acquired the twenty-two (22) acre tract of land in question from Jesse Wayne who was the record owner from 1920 to defendant's acquisition.

The surveyor traced defendant's chain of title by a deed of trust that the trustee acquired through a deed executed by Catherine Loggins in 1913. In his expert opinion the poles, distances, directions and lines described in all three deeds were the same. Taking the description of the tract of land contained in these deeds the surveyor conducted his survey. In addition to using Luther Shumate's deed, the surveyor also utilized deeds from adjoining landowners. The precise offset traverse method currently used by surveyors was employed for the survey. All of the corners of the property were identified and measured. The results of the surveyor's investigation culminated in a plat drawn by the surveyor which was used to illustrate his testimony. In response to a direct question, the surveyor testified that he located the twenty-two (22) acre tract on the ground and personally observed that the timber was being cut and removed from within the boundaries of the twenty-two (22) acre tract claimed by Shumate.

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Shumate elicited corroborating testimony from Leonard Wayne who was familiar with the twenty-two (22) acre tract once owned by his father, Jesse Wayne. Utilizing the plat drawn by the surveyor, Leonard Wayne testified as to the corners and boundaries of the twenty-two (22) acre tract. Similar testimony by the son of a former landowner that a surveyor's boundaries conformed with the understanding of the son has been held sufficient to show that the boundaries were as claimed. *Beal v. Dellinger*, 38 N.C. App. 732, 733, 735, 248 S.E. 2d 775, 777 (1978). In *Beal*, the court noted the futility of arguing against the credibility of the witnesses for credibility of the testimony is for the jury to decide. *Id.* When the court passes on a motion for a directed verdict, "[t]he testimony of the plaintiff's witnesses must be accepted at face value." *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 286, 293 S.E. 2d 632, 635 (1983). The trial judge granted a directed verdict on defendant's counterclaim for the stated reason that defendant had not sufficiently located his property on the ground by survey in accordance with the calls and descriptions of his deed in a sufficient manner for a jury to determine the location of the tract. We conclude that Shumate's evidence when viewed in the light most favorable to him was sufficient to withstand plaintiffs' motion for directed verdict, and it was for the jury to locate the boundaries. *Beal v. Dellinger, supra*, at 734, 248 S.E. 2d at 776.

We have reviewed defendant's remaining assignments of error and we find them to be without merit.

Reversed and remanded.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. TERRY LAMOUNT BARNES

No. 858SC24

(Filed 1 October 1985)

1. Criminal Law § 99.6—incest—court's social contact with the victim's doctor—no expression of opinion as to credibility

The trial court did not express an opinion as to the credibility of a witness in a prosecution for incest where, at the close of the victim's doctor's

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testimony, the court stated, "Members of the jury, I need to speak to Dr. Mintz. He is originally from Wilmington and I want to say something to him . . . , " although the better practice would be for trial judges to avoid all contact of a social nature with witnesses at the trial.

2. Criminal Law § 99.6—incest—comment by court—no prejudicial error

The trial court in a prosecution for incest did not express an opinion as to defendant's character and as to defendant's defense where, following testimony concerning injuries inflicted on other children by the victim, the court said, "We're not trying him for child abuse." Although the trial court's remark seems to lack logical relevance to the conduct of the trial and appears to have been entirely gratuitous, it was not prejudicial conduct.

3. Incest § 1—incidents between defendant's father and sisters—irrelevant—no objection at trial

Although questions as to incestuous conduct between defendant's father and sisters were irrelevant to defendant's trial for incest with his daughter, defendant's failure to object at trial failed to preserve the question for review. Rules of App. Procedure Rule 10(1)(l).

4. Incest § 1; Criminal Law § 85.2—incest—evidence of defendant's bad character—admissible

Evidence that the victim was afraid of her father because he was mean was admissible in a prosecution for incest to explain why the victim had not told her mother about the incident and was not elicited to show the bad character of defendant. G.S. 8C-1, Rule 402.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered in LENOIR County Superior Court 11 October 1984. Heard in the Court of Appeals 17 September 1985.

Defendant was convicted of felonious incest. At trial, the State's evidence tended to show that defendant engaged in sexual intercourse with his thirteen-year-old daughter, Roshelle. The testimony of the victim was supported by the testimony of Dr. Rudolph Mintz, who examined the victim and testified that Roshelle told him that her father had intercourse with her, and who testified that his examination of Roshelle indicated she had experienced sexual activity on a regular basis. Roshelle testified as to other occasions of intercourse with her father.

Defendant denied having had any sexual intercourse with his daughter and offered other evidence tending to exculpate him of the offense.

From a sentence of imprisonment entered on the jury's verdict, defendant has appealed.

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Attorney General Lacy H. Thornburg, by Sueanna P. Peeler, Assistant Attorney General, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant-appellant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred by expressing opinions as to the credibility of Dr. Mintz. Defendant correctly states the rule that a trial judge should not by words or conduct express or suggest an opinion as to the credibility of a witness. *See State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966) and cases cited and discussed therein. *See also State v. Myers*, 309 N.C. 78, 305 S.E. 2d 506 (1983); *State v. Owenby*, 226 N.C. 521, 39 S.E. 2d 378 (1946). In this case, at the close of Dr. Mintz's testimony, the following occurred:

Court: Members of the jury, I need to speak to Dr. Mintz. He is originally from Wilmington and I want to say something to him . . .

A brief recess then followed. Although we suggest that in order to avoid even the suggestion of expressing an opinion, the better practice would be for trial judges to avoid all contact of a social nature with witnesses at a trial, especially in the presence of the jury, we cannot agree that in this instance the conduct and remarks of Judge Barefoot constituted an expression of opinion as to the credibility of Dr. Mintz.

[2] Also, under this assignment, defendant contends that the trial court erred in expressing an opinion as to defendant's character and as to defendant's defense at trial. The conduct complained of occurred during the examination of defendant's wife, Joyce Barnes:

Q. Has Roshelle admitted doing any other things to your children, hurting them or injuring them in any fashion?

A. Yes, sir. One day I was in the kitchen and when I came back in Felicia had a burn on her face and I asked her what happened. She said Roshelle did it.

Q. As a result of talking with Felicia?

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A. I asked Roshelle about it.

Q. About the place on Felicia's face?

A. Yes, sir.

Court: We're not trying him for child abuse.

Defendant contends the trial court's remark was of a derogatory nature and could only have been construed by the jury as revealing the court's poor opinion of the defendant's character; and that the remark, interrupting questioning by defendant's counsel, as it did, belittled counsel in the eyes of the jury. Although the trial court's remark seems to lack logical relevance to the conduct of the trial and appears to have been entirely gratuitous, we do not construe it as prejudicial conduct.

This assignment is overruled.

[3] In another assignment, defendant contends that the trial court erred in permitting the district attorney to cross-examine defendant as to purported incidents of incestual conduct involving defendant's father and sisters. The following questions and answers occurred at the close of the cross-examination of defendant:

Q. Did you have any difficulty in your home growing up?

A. No, sir.

Q. As far as your sisters and your father?

A. Not as far as I know.

Q. Isn't it true that this sort of thing occurred between your father and your sisters growing up?

A. If it did I don't remember.

Q. Did you ever hear about this sort of thing happening between between [sic] your sisters and father growing up?

A. I don't know. I don't remember.

Defendant did not object to this testimony at trial. While we agree with defendant that the questions were not relevant to the offense for which defendant was being tried, by defendant's failure to object to this question he has failed to preserve this question for review. See Rule 10(b)(1) of the Rules of Appellate Procedure.

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[4] In another assignment of error, defendant contends that the trial court erred in allowing the State to introduce evidence of defendant's bad character in its case-in-chief. The disputed testimony occurred when the district attorney was in the process of eliciting from the victim information as to whom she had told that her father had accomplished sexual intercourse with her. At one point, the district attorney inquired as to whether Roshelle had told her mother about the incident. When Roshelle answered in the negative, she was asked whether she was afraid of her father. When she replied in the affirmative, she was asked why, to which question she responded by saying that her father was mean. Defendant argues that this testimony violated the provision of N.C. Gen. Stat. § 8C-1, Rule 404(a) of the Rules of Evidence, which provides that evidence of a person's character or a trait of his character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion. We disagree. The disputed testimony was not elicited to show the bad character of defendant, but to explain why Roshelle had not told her mother about the incident. We find it to be relevant for that purpose. See N.C. Gen. Stat. § 8C-1, Rule 402 of the Rules of Evidence.¹ This assignment is overruled.

In defendant's trial, we find

No error.

Judges WHICHARD and PHILLIPS concur.

1. Rule 402. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

Smith v. Barfield

RONALD SMITH AND WIFE, VERNA SMITH v. THOMAS C. BARFIELD AND
PAULINE BARFIELD, INDIVIDUALLY T/A BARFIELD HOUSE MOVERS

No. 853DC102

(Filed 1 October 1985)

1. Rules of Civil Procedure § 55— default judgment by clerk—sum certain

Plaintiffs' allegation that they paid defendants the sum of \$5,350 to perform a contractual obligation which defendants failed and refused to perform constituted a claim for a "sum certain" for which the clerk could enter default judgment pursuant to G.S. 1A-1, Rule 55(b)(1).

2. Appeal and Error § 16.1— additional judgment while appeal pending—absence of jurisdiction

The trial court lacked jurisdiction to enter an additional judgment while the case was on appeal. G.S. 1-294.

APPEAL by defendants from *Aycock, Judge*. Judgments entered 28 August 1984 and 10 December 1984 in PITT County District Court. Heard in the Court of Appeals 17 September 1985.

Laurence S. Graham and Pamela Weaver Best for plaintiff-appellees.

Everett, Everett, Warren & Harper, by C. W. Everett, Jr., for defendant-appellants.

WELLS, Judge.

Plaintiffs brought this action seeking to recover damages from defendants growing out of a contract between plaintiffs and defendants for defendants to move a house owned by plaintiffs. In their verified complaint, plaintiffs alleged that they agreed to pay defendants the sum of \$10,700.00 to move the house, one-half to be paid when the house was loaded for moving and the other half later. Plaintiffs paid defendants the sum of \$5,350.00, but defendants failed to move the house as agreed upon. Plaintiffs also alleged that because defendants had failed to move the house as agreed upon, plaintiffs were forced to pay the cost of a place to live in the sum of \$288.84 per month. Plaintiffs sought to recover the sum of \$5,350.00 and the sum of \$288.84 per month from September of 1983 until the house was moved. Defendants did not answer and on 30 January 1984 plaintiffs obtained a default judgment against defendants for the sum of \$6,794.20 with interest

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from 1 September 1984 until paid. Defendants did not appeal from that judgment.

On 18 July 1984, defendants filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) of the Rules of Civil Procedure to set the default judgment aside, alleging that the Clerk was without authority to enter the judgment because it was not for a sum certain as contemplated by Rule 55(b)(1) of the Rules of Civil Procedure. On 28 August 1984, the trial court entered its order in which it affirmed judgment for plaintiffs in the sum of \$5,350.00 and struck the balance of the default judgment.

On 31 August 1984, defendants gave notice of appeal from the judgment of 28 August 1984. On 8 November 1984, plaintiffs moved the trial court for judgment in the additional sum of \$2,050.49. On 10 December 1984, the trial court entered judgment for plaintiffs in the additional sum sought. Defendants gave timely notice of appeal from that judgment.

[1] Defendants first contend that the trial court erred in affirming the Clerk's judgment for the amount of \$5,350.00 because it was not a "sum certain." We disagree. Rule 55(b)(1) provides:

(b) Judgment.—Judgment by default may be entered as follows:

(1) By the Clerk.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

. . .

In their verified complaint, plaintiffs alleged that they paid defendants the sum of \$5,350.00 to perform a contractual obligation which defendants had failed and refused to perform. This clearly constitutes a claim for a sum certain under Rule 55(b)(1). This assignment is overruled.

[2] Defendants also contend that the trial court lacked jurisdiction to enter its judgment of 10 December 1984 for the additional

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sum of \$2,050.49 while the case was on appeal to this Court. We agree. N.C. Gen. Stat. § 1-294 (1983) provides that when an appeal is perfected, the appeal stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein. Clearly, the trial court was without authority to enter its judgment of 10 December 1984.

The result is that the judgment of 28 August 1984 is in all respects

Affirmed.

The judgment of 10 December 1984 is

Vacated.

The costs in this appeal shall be paid equally by plaintiffs and defendants.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. CHESTER COOLIDGE JAMES, JR.

No. 8518SC27

(Filed 1 October 1985)

**Arson and Other Burnings § 4.1— fraudulently setting fire to a dwelling house—
evidence sufficient**

The evidence was sufficient to submit the charge of fraudulently setting fire to a dwelling house to the jury where defendant stipulated that he owned the mobile home and that it was used as a dwelling, and the evidence showed that the mobile home owned by defendant was destroyed by fire, a witness saw white smoke coming from the home about two minutes after defendant left it, another witness saw defendant at the home about one and a half minutes before he saw smoke coming from it and heard defendant's car leaving the area just moments before he learned of the fire, both witnesses saw defendant remove clothing and an exercise apparatus from the home, the fire was incendiary in origin and an expert opined that it was intentionally set, defendant had said prior to the fire that he would like to get rid of the trailer, defendant owed his estranged wife \$2,200, upon proof of accidental loss defendant would have received from an insurance claim \$2,500 after deductions and payment of a lien, and defendant placed a telephone call from Roxboro to his home in Greensboro using a fictitious name on the day of the fire. G.S. 14-65.

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APPEAL by defendant from *Ross, Judge*. Judgment entered 24 August 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 September 1985.

Defendant appeals from a judgment entered upon a verdict finding him guilty of fraudulently setting fire to a dwelling house in violation of N.C. Gen. Stat. 14-65.

Attorney General Thornburg, by Associate Attorney General J. Mark Payne, for the State.

Wallace C. Harrelson, Public Defender, by Joseph E. Turner, Assistant Public Defender, for defendant appellant.

WHICHARD, Judge.

Defendant's sole assignment of error is to the denial of his motions to dismiss. We find no error.

On a motion to dismiss the question for the court is whether there is substantial evidence of each essential element of the crime charged and that the defendant committed it. *State v. Riddle*, 300 N.C. 744, 746, 268 S.E. 2d 80, 81 (1980). The test is the same whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E. 2d 649, 653 (1982). Although some cases have applied a different standard where the evidence was wholly circumstantial, *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956), resolved the conflict in our decisional law. The Court there stated:

We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904, 908, quoting from *S. v. Johnson*, 199 N.C. 429, 154 S.E. 730: "If there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." The above is another way of saying there must be substantial evidence of all material elements of the

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offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. (Citations omitted.)

Stephens at 383-84, 93 S.E. 2d at 433-34. *Accord, State v. Jones*, 303 N.C. 500, 503-04, 279 S.E. 2d 835, 838 (1981); *State v. Daniels*, 300 N.C. 105, 114, 265 S.E. 2d 217, 222 (1980). "If the evidence . . . gives rise to a reasonable inference of guilt, it is for . . . the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt." *Jones* at 504, 279 S.E. 2d at 838. *Accord, State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967).

The essential elements of the crime charged here are (1) that the accused was the owner or occupier (2) of a building used as a dwelling house (3) which he set fire to or burned or caused to be burned (4) for a fraudulent purpose. N.C. Gen. Stat. 14-65. Defendant stipulated that he owned the mobile home and that it was used as a dwelling. The only questions were whether there was substantial evidence that defendant burned the home, and if so, whether he did it for a fraudulent purpose.

The evidence, considered in the light most favorable to the State as required, *Earnhardt* at 67, 296 S.E. 2d at 652, tended to show the following:

Fire destroyed a mobile home owned by defendant. One witness saw white smoke come from the home about two minutes after defendant left it. Another saw defendant at the home about one and one-half minutes before he saw smoke coming from it. Although he did not see defendant leave, he heard defendant's car leaving the area just moments before he learned of the fire. Both witnesses saw defendant remove from the home clothing and an exercise apparatus.

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There was expert testimony that the fire started in the bathroom and that it was incendiary in origin. The expert opined that the fire was intentionally set.

Prior to the fire defendant had said that he "would like to get rid of the trailer." Defendant owed his estranged wife \$2,200.00 which he had borrowed from her account without permission. Defendant filed an insurance claim for \$9,550.00 even though the maximum amount of coverage under his policy was \$6,395.00. Upon proof of accidental loss defendant would have received, after deductions and payment of the lien on his mobile home, more than \$2,500.00. Finally, on the day of the fire defendant placed a telephone call from Roxboro to his home in Greensboro using a fictitious name.

We hold that the foregoing constituted substantial evidence from which the jury reasonably could infer that defendant set fire to his mobile home for a fraudulent purpose. Accordingly, the motions to dismiss were properly denied.

No error.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ELMER J. HANES

No. 8521SC154

(Filed 1 October 1985)

1. Criminal Law § 138— mitigating factor—honorable discharge from armed services—refusal to consider evidence—error

The trial court erred when sentencing defendant for six felony counts of possession of cocaine by refusing to consider evidence of defendant's honorable discharge from the armed services without a copy of defendant's discharge. While credibility is determined by the trial court, the refusal even to consider the evidence without documentary proof was error. G.S. 15A-1340.4(a)(2) (1983).

2. Criminal Law § 138— mitigating factor—failure to find good character and good reputation—no error

The trial court did not err in sentencing defendant for six felony counts of possession of cocaine by failing to find as a mitigating factor that defendant had been a person of good character and had a good reputation in the com-

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munity in which he lived because, while defendant's evidence as to good character was persuasive, it did not compel such a finding.

3. Criminal Law § 138— aggravating factors—pattern of criminal conduct and big time drug dealer—error

The trial court erred in sentencing defendant for six felony counts of possession of cocaine by finding as non-statutory aggravating factors that defendant had engaged in a pattern of criminal conduct over an extended period of time and that defendant's guilty pleas indicated that he was a "big time drug dealer" where there was no evidence of criminal activity or drug dealing on defendant's part other than that related to his guilty pleas. These aggravating factors were based on the same evidence necessary to prove defendant's guilt of the offenses to which he pled guilty. G.S. 15A-1340.4(a)(1) (1983).

4. Criminal Law § 138.11— resentencing—additional recommendation that fine and restitution be paid before early release—not prejudicial

The trial court did not err when resentencing defendant for six felony counts of possession of cocaine by adding the condition, as a recommendation, that defendant's fine and restitution be paid before an early release. Such a recommendation has no legal effect and is not binding on the Department of Corrections. G.S. 15A-1335 (1983).

APPEAL by defendant from *Wood (William Z.)*, Judge. Judgment entered 28 September 1984 in FORSYTH County Superior Court. Heard in the Court of Appeals 24 September 1985.

At the 20 September 1982 session of the Superior Court of Forsyth County, defendant pled guilty to six felony counts of possession of cocaine. The sentence imposed was challenged in a motion for appropriate relief. Defendant's motion having been subsequently allowed, defendant was resentenced by Judge Wood, and defendant has now appealed from his re-sentencing to a term in excess of the presumptive sentence.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Charles H. Hobgood, for the State.

Purser, Cheshire, Manning & Parker, by Joseph B. Cheshire V and Sheila Hochhauser, for defendant appellant.

WELLS, Judge.

[1] Defendant first contends that the trial court erred in failing to find as a mitigating factor that defendant was honorably discharged from the armed services of the United States, a statutory mitigating factor under N.C. Gen. Stat. § 15A-1340.4(a)(2) (1983).

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At defendant's hearing, his wife testified that defendant had served in the Air Force for seven years and was honorably discharged. Edward L. Frederick, defendant's friend and business associate and work release supervisor, testified that he and defendant had discussed their military service and that defendant had told him defendant was honorably discharged from the Air Force. Defendant did not testify. The transcript of the hearing makes it clear that Judge Wood refused to consider this factor unless a copy of defendant's discharge was furnished. While credibility is determined by the trial court, it is the duty of the court to weigh and consider the evidence presented and to make its determination based on that evidence. His refusal to even consider the evidence without documentary proof was error. See *State v. Wood*, 61 N.C. App. 446, 300 S.E. 2d 903, *disc. rev. denied*, 308 N.C. 547, 302 S.E. 2d 884 (1983).

[2] Defendant next contends that the trial court erred in failing to find as a mitigating factor that defendant had been a person of good character and had a good reputation in the community in which he lived, a statutory factor. While defendant's evidence as to good character was persuasive, it did not compel a finding of this factor. See *State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984) and cases cited and discussed therein. This assignment is overruled.

[3] In another assignment, defendant contends that the trial court erred in finding as non-statutory aggravating factors (1) that defendant had engaged in a pattern of criminal conduct over an extended period of time, and (2) that defendant's guilty pleas indicate that defendant was a "big time drug dealer." Our examination of the transcript discloses no evidence of criminal activity on defendant's part other than that related to his guilty pleas, nor that defendant was dealing in drugs in any context other than those activities relating to his guilty pleas. Thus, it is clear that the finding of these factors was based on the same evidence necessary to prove defendant's guilt of the offenses to which he pled guilty. We hold this to be a violation of the provisions of N.C. Gen. Stat. § 15A-1340.4(a)(1) (1983). We also hold that this finding violates the rule established by our Supreme Court in *State v. Westmoreland*, 311 N.C. ---, slip op. No. 356A84 (N.C. Sept. 5, 1985) that contemporaneous convictions of joined offenses may not be used as a factor in aggravation.

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[4] In another assignment, defendant contends that the trial court erred in making recommendation as to defendant's release. In the first judgment entered in this case, defendant was ordered to pay a fine of \$50,000.00 and restitution in the amount of \$12,200.00. When defendant was resentenced, Judge Wood added the condition, as a recommendation, that defendant's fine and restitution "be paid before any early release," which defendant contends was a violation of N.C. Gen. Stat. § 15A-1335 (1983), which provides that when a sentence imposed in Superior Court has been set aside, the Court may not impose a new sentence for the same offense which is more severe than the prior sentence. Such a recommendation has no legal effect, is not binding on the Department of Corrections, and therefore is not prejudicial.

For the reasons stated, there must be a new sentencing hearing consistent with this opinion.

Remanded for resentencing.

Judges ARNOLD and MARTIN concur.

A. J. RIVENBARK v. SOUTHMARK CORPORATION AND DREXEL BURNHAM
LAMBERT REALTY COMPANY, INC.

No. 8418SC1338

(Filed 1 October 1985)

Appeal and Error § 6.2— interlocutory order not appealable

An interlocutory order requiring plaintiff to pay into court disputed rentals which he had collected was not immediately appealable. G.S. 1-277; G.S. 7A-27.

APPEAL by plaintiff from *Hobgood, Hamilton H., Judge*. Order entered 14 June 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 June 1985.

On February 11, 1983 defendant Southmark Corporation bought a tract of Guilford County real estate identified as Wendover Business Park, Phase II from plaintiff and leased the land back to plaintiff for a term ending February 23, 1984. The sales

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price of the land was to be partially determined by later developments. Southmark paid plaintiff \$2,500,000 when the transaction was closed and agreed to pay more, according to a certain formula, if the annual base rent of leases in effect on February 13, 1984 exceeded a certain amount. In December 1983 defendant Southmark conveyed the property to defendant Drexel Burnham Lambert Realty Company, Inc. subject to the aforesaid agreements. Shortly before February 13, 1984, the date for determining the total purchase price of the land, plaintiff submitted five tenant leases to Southmark for approval, but Southmark contended that the leases were spurious, contrived to improperly raise the purchase price of the land, and refused to approve them. Plaintiff sued defendants for \$709,305.75, the additional purchase money due under the formula agreed upon if the leases are genuine, alleging that Southmark's refusal to approve the leases was a breach of contract. By their answer the defendants denied plaintiff's claim, alleged that plaintiff had breached the contract, and asserted several counterclaims of their own.

On 8 March 1984, plaintiff's motion for a preliminary injunction to prevent defendants from taking possession of the leased premises and collecting the rents during the pendency of the action was denied by Judge Hobgood for the reason that plaintiff has a complete remedy at law for the monetary damages sought. The order allowing defendants to take possession of the property and collect the rents until the court ruled otherwise also required them to secure the payment of any final judgment plaintiff might obtain against them by depositing with the court an irrevocable letter of credit in the amount of \$800,000. Neither party appealed from this order. On 5 June 1984, defendants alleged that plaintiff had violated the order by collecting rents from the tenants for the months of March and April and moved that plaintiff be held in contempt. In response plaintiff contended that the order did not permit defendants to collect the rents until the letter of credit was deposited, which was after the March and April rentals were paid. After a hearing on the motion, Judge Hobgood entered an order on 14 June 1984, stating that in entering the previous order he intended for defendants to collect the rents beginning with the month of March 1984, and ordered plaintiff to pay the sums collected into court. Plaintiff appealed from this latter order, contending that the judge had no authority to enter it.

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Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Norwood Robinson and Robert J. Lawing, for defendant appellees.

PHILLIPS, Judge.

Though neither party addressed the question this appeal has no business being here and must be dismissed. It is a fragmentary appeal from an interlocutory order that leaves pending and unlitigated all of the claims of both parties; and no substantial right of plaintiff can possibly be affected to the slightest extent if the validity of the order is not determined until after a final judgment is entered in the case. See G.S. 1-277, G.S. 7A-27; G.S. 1A-1, Rule 54, N.C. Rules of Civil Procedure; *Waters v. Qualified Personnel*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *N. C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178, *reh. denied*, 286 N.C. 547, --- S.E. 2d --- (1974). Indeed, if plaintiff's right to the disputed rentals is established at trial that adjustment can easily be accomplished by the final judgment and even if the judgment is for every cent that plaintiff sued for its collectibility is assured. Thus, not only is the appeal unauthorized by our law, it is also to no purpose.

Dismissed.

Judges BECTON and EAGLES concur.

ANDREW K. BARKER v. CAROLYN BARKER HIGH

No. 847DC1269

(Filed 1 October 1985)

1. Divorce and Alimony § 24.7— increase in child support—changed circumstances

Evidence and findings that the children's expenses have increased as they have become older and that plaintiff's earnings have increased by approximately \$2,000 a year supported a conclusion of a substantial change in circumstances justifying an increase in the amount of child support.

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2. Divorce and Alimony § 24.6— increase in child support—changed circumstances—evidence of incomes prior to original support order

While 21 January 1981 was the correct starting point in considering whether a substantial change affecting the children's needs and plaintiff's ability to pay had occurred, the court could consider what the parties' circumstances were just prior to that date in determining what the circumstances were on that date, and the court properly admitted evidence of incomes of the parties for 1980.

3. Divorce and Alimony § 24.1— child support—earnings of stepfather irrelevant

Evidence of the earnings and estate of defendant's present husband was irrelevant in a proceeding to increase child support since, nothing else appearing, a stepfather is under no duty to support the children of his wife by a previous marriage.

APPEAL by plaintiff from *Sumner, Judge*. Order entered 27 April 1984 in District Court, NASH County. Heard in the Court of Appeals 5 June 1985.

Plaintiff's appeal is from an order increasing his monthly payments for the support of his two minor children from \$250 for each child to \$350. The monthly payment for each child was first set at \$250 by the parties' separation agreement executed in April 1980. A few months later, following their divorce in Haiti, defendant refused to permit plaintiff to visit the children and he brought this action to enforce his visitation rights. By her further answer defendant asked for custody of the children and pleaded the separation agreement in which plaintiff had consented thereto. On 28 January 1981, without hearing any evidence or making any findings but with the written consent of the parties and their lawyers, the court entered an order that deleted the paragraph in the separation agreement which required plaintiff to pay defendant \$250 a month for the support of each child and directed plaintiff to thereafter pay that amount each month into court instead. Three years and three months later the order increasing the payments was entered following the receipt of evidence and the making of various findings of fact and conclusions of law.

Moore, Diedrick, Whitaker & Carlisle, by J. Edgar Moore, for plaintiff appellant.

Valentine, Adams, Lamar & Etheridge, by Franklin L. Adams, Jr., and Hall, Hill, O'Donnell & Taylor, by Raymond M. Taylor, for defendant appellee.

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PHILLIPS, Judge.

[1] The court's conclusion that the circumstances had substantially changed since the previous order was entered and that increasing the child support payments \$100 each month was warranted is adequately supported by the findings of fact and competent evidence, and plaintiff's contention to the contrary is overruled. Among other things, the evidence and findings show that the children's expenses have increased because they are three years older and that plaintiff's earnings increased from \$30,674 in 1980 to \$36,640 in 1983. This is support enough for the modification made.

[2, 3] Plaintiff's further contentions that the court erred in receiving and considering evidence that was improper, and also in refusing to receive and consider other relevant evidence are likewise without merit in our opinion and we overrule them. The evidence improperly received and considered, according to plaintiff, concerned the income of both parties for the year 1980, which was before the previous order was signed on 21 January 1981. While 21 January 1981 is certainly the correct starting point in considering whether a substantial change affecting the children's needs and the plaintiff's ability to pay has occurred, *Newman v. Newman*, 64 N.C. App. 125, 306 S.E. 2d 540 (1983), in determining what the circumstances were on that date it was proper for the court to consider evidence showing what the circumstances were just prior to that time. Plaintiff had the same job and employer when the order was signed that he had during all of the preceding year and the evidence as to his earnings for that year tended to show that he was earning the same amount three weeks later, and the court did not err in receiving and considering the evidence for that purpose. The evidence that the court erroneously refused to receive and consider, so plaintiff contends, was evidence as to the earnings and estate of defendant's present husband. Nothing else appearing—and nothing else does appear in this case—a stepfather is under no duty to support the children of his wife by a previous marriage. *In re Dunston*, 18 N.C. App. 647, 197 S.E. 2d 560 (1973). Thus, evidence as to the earnings or estate of the stepfather was irrelevant to the issue before the trial judge and his refusal to receive the evidence was not error.

Plaintiff's other contentions are likewise without merit and we affirm the order appealed from.

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Affirmed.

Judges BECTON and EAGLES concur.

E. E. MOCK AND WIFE, ALPHA MOCK v. JESS MOCK AND ANCIL MOCK
(TESTER)

No. 8523SC85

(Filed 1 October 1985)

Reformation of Instruments § 1.1— reformation of deed—unilateral mistake—summary judgment for defendants proper

Summary judgment for defendants was proper in an action to reform a deed where plaintiffs had conveyed to defendants certain land on the condition that defendants look after plaintiffs for the rest of their lives and pay \$2,000 to each of the living children of the male plaintiff within three years of his death, defendants had divorced and the feme defendant remarried, and plaintiffs had alleged that their agreement was only with the male defendant, that they had never intended for the feme defendant to be a grantee in the deed, and that her name was put in the deed through their mistake and that of the scrivener. The mistake of one party not induced by the fraud of the other is not enough.

APPEAL by plaintiffs from *Rousseau, Judge*. Order filed 6 September 1984 in Superior Court, ASHE County. Heard in the Court of Appeals 27 August 1985.

Plaintiff E. E. Mock is the father and his wife is the step-mother of the defendant, Jess Mock, who was once married to, but is now divorced from, Ancil Mock. In 1973 plaintiffs executed a deed conveying certain land to the defendants on condition that they look after plaintiffs for the rest of their lives and pay \$2,000 to each of the living children of E. E. Mock within three years of his death. After the defendants were divorced and the feme defendant had remarried, plaintiffs sued to reform the deed, alleging in a verified complaint that their agreement was only with Jess Mock, that they never intended for Ancil Mock to be a grantee in the deed, and that her name was put in the deed through their mistake and that of the scrivener. In her answer defendant Ancil Mock (Tester), in substance, alleged that she and her former husband purchased the property involved on the conditions alleged by plaintiffs and that her name was properly

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contained in the deed. She moved for summary judgment and in support thereof filed an affidavit to the effect that when she and Jess Mock purchased the land from plaintiffs she intended for her name to be placed on the deed as a joint grantee with Jess Mock and that no mistake was made in drawing the deed accordingly. No other evidence was submitted.

Hall and Brooks, by John E. Hall, for plaintiff appellants.

Vannoy & Reeves, by Jimmy D. Reeves, for defendant appellee Ancil Mock (Tester).

PHILLIPS, Judge.

While a written instrument may be reformed on the grounds of mutual mistake, the mistake that the law requires is that of both parties to the instrument. *Coppersmith v. Aetna Insurance Co.*, 222 N.C. 14, 21 S.E. 2d 838 (1942). The mistake of one party not induced by the fraud of the other is not enough. *Crawford v. Willoughby*, 192 N.C. 269, 134 S.E. 494 (1926). In this case no legal grounds for reforming the deed in question have either been pleaded or proved by plaintiffs and the order of summary judgment dismissing their claim was properly entered. Accepting plaintiffs' verified complaint as an affidavit and assuming that all the facts stated in the complaint are within their personal knowledge, what it amounts to is a claim and testimony that Ancil Mock's name was put in the deed due to the mistake of the plaintiffs and the attorney who drew the deed; which is not a "mutual mistake," but an unilateral mistake. See 76 C.J.S. *Reformation of Instruments* Sec. 28(d)(2) p. 368 (1952). Plaintiffs' reliance upon *Cameron v. Cameron*, 43 N.C. App. 386, 258 S.E. 2d 814 (1979) is misplaced. Though that case also involved a scrivener's mistake, the holding was not that a scrivener's mistake and that of one of the parties to an instrument is a basis for reformation; the holding was that the mutual mistake of the parties to the instrument in question had been shown by defendant's evidence to the effect that he and the plaintiff agreed that her name would not be in the instrument.

Affirmed.

Judges WELLS and WHICHARD concur.

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FRANCES LEE NANCE McIVER v. GARY CALVIN McIVER

No. 8522DC47

(Filed 1 October 1985)

Divorce and Alimony § 30— equitable distribution—necessity for absolute divorce

An order of equitable distribution must be supported by a finding of fact, based on competent evidence, that a judgment of absolute divorce has been entered by a court of competent jurisdiction. G.S. 50-21(a).

APPEAL by defendant from *Fuller, Judge*. Judgment entered 4 September 1984 in District Court, IREDELL County. Heard in the Court of Appeals 16 September 1985.

This is an action for alimony without divorce in which plaintiff also seeks equitable distribution of the marital property and attorney fees. Plaintiff alleges in her complaint that she made valuable contributions to the marital relationship, and as a dependent spouse unable to support herself is therefore entitled to one-half of the marital property. Defendant filed an answer, cross-action, and counterclaim in which he denied that plaintiff made any contribution to the property at issue and sought recovery of monies plaintiff converted for her own use during the marriage. On 16 September 1982, plaintiff filed a response denying defendant's charges. On 16 December 1983, plaintiff filed an equitable distribution affidavit which listed the value of all property owned by plaintiff or defendant, stated the source of the funds used to acquire each property, and proposed a distribution. Defendant filed his equitable distribution affidavit on 1 February 1984. Defendant filed an amended affidavit on 27 August 1984. The case came on for hearing on 27 August 1984. The equitable distribution action was decided by the trial judge solely upon the pleadings and affidavits. Defendant's request that oral testimony be presented at the hearing was denied by the trial judge. In an order filed 5 September 1984, the court entered judgment for equitable distribution. The court found several items to be marital property, awarded plaintiff title to an automobile and several major appliances, and ordered defendant to pay plaintiff \$13,250 as her one-half interest in the marital home. Defendant appealed from the entry of this Order.

No counsel for plaintiff, appellee.

William L. Durham for defendant, appellant.

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HEDRICK, Chief Judge.

Actions for equitable distribution are subject to the requirements of G.S. 50-21(a) which provides in relevant part that:

Upon application of a party to an action for divorce, an equitable distribution of property *shall follow* a decree of absolute divorce. . . . The equitable distribution *may not precede* a decree of absolute divorce. . . .

(Emphasis added.)

In *McKenzie v. McKenzie*, 75 N.C. App. 188, 330 S.E. 2d 270 (1985), this Court held that the trial judge had no authority to enter a judgment of equitable distribution when the record contained no indication that a judgment of absolute divorce had been entered. In the present case the court made no finding that a judgment of absolute divorce had been entered; indeed, the record before us contains no competent evidence that there was an absolute divorce. We hold that an order of equitable distribution must be supported by a finding of fact, based on competent evidence, that a judgment of absolute divorce has been entered by a court of competent jurisdiction. The judgment in the present case, purportedly an equitable distribution of the marital property, is not supported by this essential finding of fact. Because the critical finding that an absolute divorce had been granted is absent, this judgment must be vacated.

Vacated.

Judges ARNOLD and COZORT concur.

WALTER V. DOBRUCK v. MARGARET SINK LINEBACK AND HER HUSBAND,
ALAN LINEBACK

No. 8530SC46

(Filed 1 October 1985)

Rules of Civil Procedure § 49; Trial § 40— issues not submitted to jury—waived by failure to request or to take exception to the court's failure to submit

In an action for breach of promise, unjust enrichment, and constructive trust arising from plaintiff's conveyance of real property to defendant and

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defendant's marriage to someone else, plaintiff waived any right that he may have had to have the jury pass on any issues other than breach of promise where plaintiff expressly approved the issues submitted to the jury, which were confined to the breach of promise claim, advised the court that no other issues were necessary, and neither requested other issues nor took exception to the court's failure to submit other issues. G.S. 1A-1, Rule 49(c).

APPEAL by plaintiff from *Downs, Judge*. Judgment entered 18 May 1984 in Superior Court, JACKSON County. Heard in the Court of Appeals 27 August 1985.

Roberts, Cogburn, McClure & Williams, by Isaac N. Northup, Jr., for plaintiff appellant on appeal only.

Herbert L. Hyde for defendant appellees.

PHILLIPS, Judge.

From 1972 until the fall of 1978 plaintiff and the femme defendant lived together without benefit of clergy, and in 1975 he deeded a certain piece of Jackson County real estate to her. In December 1978 she married the male defendant and soon thereafter plaintiff sued to recover the property or its value. The grounds asserted for relief were breach of contract, in that the deed was delivered to the femme defendant in consideration of her promise to marry him and she breached that promise and rendered its performance impossible by marrying someone else, unjust enrichment, and constructive trust. Before the action was tried plaintiff took a voluntary dismissal without prejudice and in apt time filed this action, which sets forth the same claims earlier asserted. When the case was tried the jury, by appropriate issues submitted to them, was asked to determine whether defendant promised to marry plaintiff and, if so, whether that promise was breached. The verdict was that she did promise to marry plaintiff but did not breach the promise, and judgment was entered thereon for the defendant.

In appealing and assigning error plaintiff does not assert that the verdict against him was erroneously arrived at; his sole contention is that the verdict does not support the judgment entered, which it manifestly does. The argument is that the verdict is incomplete and inadequate because the pleadings and evidence raised issues other than those submitted to and answered by the jury. The issues so raised but not resolved, according to plaintiff,

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were whether defendant has been unjustly enriched by the events referred to, and whether she holds title to the property received under a constructive trust for plaintiff's benefit. Whether the evidence raised these other issues is immaterial and need not be determined; for the record plainly shows that plaintiff expressly approved the issues submitted to the jury, which were confined to the breach of promise claim, advised the court that no other issues were necessary, and neither requested that other issues be submitted nor took exception to the court's failure to submit other issues. By so doing plaintiff waived any right that he may have had to have the jury pass on any issues other than those submitted. Rule 49(c), N.C. Rules of Civil Procedure; *Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E. 2d 566 (1975).

No error.

Judges WELLS and WHICHARD concur.

M & J LEASING CORPORATION v. LARRY F. HABEGGER

No. 8423SC1361

(Filed 1 October 1985)

Venue § 5— recovery of sums due under equipment lease—recovery and sale of equipment—change of venue not required

Where the lessor of farm equipment sought to recover rentals due under the lease agreement and to recover the equipment in order to sell it and apply the proceeds against the sum due, the trial court was not required by G.S. 1-76.1 to transfer the case to the county in which defendant lessee resides since the personal property has not yet been sold and the action is not "to recover a deficiency which remains owing on a debt"; nor was the trial court required by G.S. 1-76(4) to transfer the case to the county where the leased equipment is located since the primary relief sought is the recovery of the money owed, and possession of the leased equipment is sought only as an ancillary remedy.

APPEAL by defendant from *Rousseau, Judge*. Order entered 10 September 1984 in Superior Court, WILKES County. Heard in the Court of Appeals 22 August 1985.

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In August 1983 plaintiff, a North Carolina corporation whose principal office is in Wilkes County, leased an irrigation system and other farm machinery and equipment to defendant, a Davie County resident, for a term ending in April 1986. Under the terms of the leases defendant agreed to make periodic payments for the use of the articles and had the option to purchase them at the end of the term at their fair market value; and upon defendant's default plaintiff had the right to recover the rents then due and thereafter accruing, take possession of and sell the articles, and apply the proceeds against the total sum owed. In June 1984 plaintiff filed this action in Wilkes County District Court, alleging that defendant then owed plaintiff \$38,555.66 in past due rentals and was obligated under the leases to pay plaintiff \$83,225.63 altogether; it was also alleged that plaintiff was entitled to obtain the articles by claim and delivery and sell them in reduction of defendant's indebtedness. Pursuant to defendant's motion, the case was transferred to the Superior Court Division because of the amount in controversy; but his motion to change the venue to Davie County was denied, and defendant appealed therefrom.

Moore & Willardson, by John S. Willardson, for plaintiff appellee.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Herman L. Stephens, for defendant appellant.

PHILLIPS, Judge.

Defendant contends that under the terms of both G.S. 1-76.1 and G.S. 1-76(4) the trial court was required to transfer this case to Davie County, where he resides and the leased articles are situated. We disagree and affirm the judgment appealed from.

Subject to the power of the court to change the place of trial as provided by law, G.S. 1-76.1 provides that:

[A]ctions to recover a *deficiency, which remains* owing on a debt *after* secured personal property *has been sold* to partially satisfy the debt, must be brought in the county in which the debtor or debtor's agent resides or in the county where the loan was negotiated. (Emphasis added.)

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This statute has no application to this case because the personal property involved has not yet been sold and the action is not "to recover a deficiency which remains owing on a debt."

Subject to the power of the court to change the place of trial as the law authorizes, G.S. 1-76(4) provides that actions for the recovery of personal property must be tried in the county in which the subject of the action or some part thereof is situated "*when the recovery of the property itself is the sole or primary relief demanded.*" (Emphasis supplied.) This statute does not govern the case either because the recovery of the leased property is not "the sole or primary relief demanded." The primary relief sought in this case is the recovery of the money owed; the possession of the leased equipment through claim and delivery is sought only as an ancillary remedy.

Affirmed.

Judges WELLS and WHICHARD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 OCTOBER 1985

AUTO EQUIP., INC. v. REYNOLDS No. 8522DC156	Iredell (83CVD0718)	Reversed & Remanded
CLARK v. HOBGOOD No. 859SC553	Granville (84CVS421) (84CVS19)	Dismissed
HOLDER v. N.C. DEPT. OF TRANS. No. 8510IC616	Ind. Comm. (TA-7722)	Affirmed
HONEYCUTT v. HONEYCUTT No. 8518DC94	Guilford (82CVD2774)	Affirmed
IN RE BOWLIN No. 8523DC489	Wilkes (84J79)	Affirmed
IN RE BRASWELL AND JONES No. 8427DC1318	Gaston (84J0147) (350 84 0175) (350 84 0197) (80J327) (350 84 0174)	No Error
IN RE BULLARD No. 8516SC509	Robeson (84CVS1826)	Affirmed
NOE v. BECK No. 8512DC67	Cumberland (83CVD2577)	Affirmed
PETRILLO v. PETRILLO No. 8510DC167	Wake (84CVS2423)	Affirmed in part; reversed in part
STATE v. BOONE No. 843SC1334	Pitt (84CRS11446) (84CRS11447)	No Error
STATE v. DAVIDSON No. 8519SC562	Cabarrus (84CRS15377)	Remanded
STATE v. HALL No. 8418SC1278	Guilford (84CRS22249) (84CRS22250)	No error at trial; reversed and re- manded for a new sentencing hearing
STATE v. HICKS No. 8515SC627	Chatham (84CRS3099) (84CRS3100)	No Error

STATE v. HOLBERT No. 8529SC635	Henderson (84CRS1671)	No Error
STATE v. HOLLINGSWORTH No. 8412SC1163	Cumberland (84CRS12982)	No Error
STATE v. HOUSE No. 8421SC1113	Forsyth (84CRS3322)	Remanded for a new sentencing hearing
STATE v. JEFFERS No. 844SC1122	Sampson (84CRS1586) (84CRS1587) (84CRS1588) (84CRS1589) (84CRS1590) (84CRS1591) (84CRS1593) (84CRS2701)	No Error
STATE v. LUTES No. 8412SC1259	Cumberland (83CRS50407)	No Error
STATE v. McQUAIG No. 8414SC1124	Durham (82CRS25470)	No Error
STATE v. MORRIS No. 8514SC64	Durham (83CRS38571) (83CRS38572) (83CRS38573) (83CRS38574)	No Error
STATE v. PRATT No. 8527SC537	Gaston (84CRS29939)	No Error
STATE v. REDFEARN No. 8526SC600	Mecklenburg (84CRS60870) (84CRS60875)	No Error
STATE v. SINGLETON No. 853SC33	Pamlico (81CRS853) (81CRS854)	No Error
STATE v. STARR No. 8527SC98	Cleveland (84CRS2361)	No Error
STATE v. UZZELL No. 848SC1321	Wayne (84CRS5664) (84CRS5665) (84CRS5664A) (84CRS5665A)	No Error
STATE v. WOODS No. 8514SC512	Durham (82CRS11450) (82CRS11453)	Affirmed

THOMPSON v. COOK
No. 8519DC376

Montgomery
(81CVD167)

Affirmed

WALLER v. WALLER
No. 848DC1362

Wayne
(84CVD693)

Affirmed

WILLIAMS v. DEVORE
No. 8526SC594

Mecklenburg
(84CVS10428)

Affirmed in part,
dismissed in part

Grant v. Burlington Industries, Inc.

LILA S. GRANT v. BURLINGTON INDUSTRIES, INC. AND LIBERTY MUTUAL INSURANCE CO.

No. 8410IC1352

(Filed 15 October 1985)

1. Master and Servant § 93.3— chronic obstructive lung disease—family practitioner with experience treating pulmonary diseases—exclusion of testimony erroneous

The Industrial Commission erred in an occupational lung disease case by excluding the testimony of the plaintiff's family doctor on the nature and extent of plaintiff's disability where the doctor was an expert in family medicine with experience in the field of pulmonary diseases and had treated plaintiff on a regular basis.

2. Master and Servant § 94.1— chronic obstructive lung disease—findings not sufficient on disability

In an action in which plaintiff sought benefits for total disability for chronic obstructive lung disease, the Industrial Commission's findings on the issue of disability were not sufficiently specific, were internally inconsistent, failed to resolve evidentiary conflicts, and were insufficient to determine the rights of the parties on the issue of disability.

3. Master and Servant § 68— chronic obstructive lung disease—no disability—compensation awarded—no error

The Industrial Commission did not err by awarding compensation under G.S. 97-31(24) (1979) for chronic obstructive lung disease even though it found that plaintiff was not disabled. Total or partial disablement must be shown in all cases in which compensation is sought under G.S. 97-29 or 97-30; however, if compensation is sought in the alternative under G.S. 97-31, disablement is presumed from the injury. G.S. 97-52 (1979).

Judge WEBB dissenting.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 14 September 1984. Heard in the Court of Appeals 22 August 1985.

Gunter and Wansker, by Woodrow W. Gunter, II, for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by J. A. Gardner, III, and John F. Morris, for defendant appellees.

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BECTION, Judge.

I

In January 1982, the plaintiff, Lila S. Grant, filed a claim with the North Carolina Industrial Commission (Commission), seeking benefits for total disability due to occupational lung disease. A Deputy Commissioner concluded that Grant's chronic obstructive lung disease was an occupational disease but that Grant was not disabled as a result. Grant's claim was denied, and Grant appealed to the Commission. In its opinion and award, the Commission adopted the factual findings and conclusions of the Deputy Commissioner. However, the Commission made an additional finding that Grant had sustained permanent damage to each of her lungs and was entitled to \$15,000 equitable compensation under N.C. Gen. Stat. Sec. 97-31(24) (1979).

Grant appeals, and the defendants, Burlington Industries, Inc. and Liberty Mutual Insurance Company, cross-appeal. Grant contends: (1) that prejudicial error was committed in certain evidentiary rulings relating to the testimony of Dr. Fred McQueen; (2) that the Commission failed to make sufficiently specific findings on the issue of disability; and (3) that the Commission erred in finding and concluding that Grant is not disabled. In their cross-appeal, defendants contend that because no disability was found, it was error for the Commission to award compensation under G.S. Sec. 97-31(24).

As to Grant's appeal, we hold that (1) Dr. McQueen's testimony was erroneously excluded, and (2) the findings on disability were inadequate. We therefore remand the case so that the excluded testimony may be considered and so that the Commission may make more specific findings on disability. We therefore do not consider whether the Commission properly found that Grant was not disabled. As to the defendants' cross-appeal, we conclude that benefits are available to Grant under G.S. Sec. 97-31(24) for permanent damage to her lungs even if, on remand, the Commission concludes that she is not disabled.

II

Lila S. Grant was 51 years old at the hearing of this matter. Grant worked for Burlington Industries as a weaver in its Klopman plant for approximately eighteen years between November

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1949 and May 1979. During approximately twelve years of that period, Grant was on maternity leave, worked as a homemaker, worked for Stanley Home Products, and worked as an insurance branch manager. Grant testified that her duties as branch manager largely entailed soliciting insurance door-to-door. In May 1979, she was transferred to Burlington's Richmond plant, where she worked as a smash repairer in the weave room until January 1982. The Klopman plant processed cotton material or cotton-polyester blends during Grant's employment there. The Richmond plant manufactured synthetic material only.

Medical evidence was provided by the principal witnesses: Grant herself, Dr. Charles Williams, Dr. Ted Kunstling and Dr. Fred McQueen. According to Grant, she first began to experience breathing problems in the late 1960's. She testified that her breathing problems were originally more severe on weekdays and less severe on the weekends but that by 1975 she was having breathing problems every day of the week. Grant stated that she took the lower-paying job of a smash repairer in 1979 because she was no longer able to perform the more strenuous job of weaver; however, when she last worked in 1982, she was not able to perform the duties of a smash repairer. Grant described the remedies she uses to alleviate her problems, such as elevating her bed upon cement blocks, and listed the prescription drugs she takes. Grant currently experiences breathlessness performing household chores and has difficulty breathing during her sleep.

Pulmonary function tests performed on Grant by Burlington in 1973 revealed "moderate airway obstruction." Between 1973 and 1981, these tests revealed a gradual decline in Grant's lung function. Dr. Charles Williams, who saw Grant on 12 October 1981, testified that pulmonary function studies conducted by him showed a moderate obstructive impairment of ventilation. Grant was also seen on 20 April 1982 by Dr. Kunstling, a pulmonary specialist, on referral from the Industrial Commission. He testified that Grant had chronic obstructive pulmonary disease, that the disease resulted in 25% to 35% respiratory impairment, and that it was permanent. Dr. Kunstling stated that Grant "would probably not be capable of performing jobs requiring hurrying, climbing, or heavy lifting, but should be capable of performing less strenuous jobs such as office work and other types of relative light work."

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Also introduced into evidence was the deposition of Dr. Fred McQueen, a specialist in family practice medicine, who treated Grant throughout 1982. He testified that Grant suffered from chronic obstructive pulmonary disease, and also opined, over objection, that Grant was disabled for employment that required more than mild exertion. Dr. McQueen's testimony is discussed more fully below.

III

[1] Grant's first argument is that reversible error was committed by the Commission in its evidentiary rulings on certain portions of the testimony of Dr. Fred McQueen.

Dr. McQueen's testimony was taken by deposition on 14 December 1982. In its opinion and award, twelve separate objections and motions to strike relating to Dr. McQueen's testimony were sustained or granted by the Deputy Commissioner. In its appeal to the Commission, Grant assigned error to ten of those rulings. The Commission, without explicit reference to these evidentiary rulings, adopted the stipulations, findings, and conclusions of the Deputy Commissioner. Insofar as the Commission did not alter the Deputy Commissioner's rulings, we deem them adopted or affirmed by the Commission. In the ten evidentiary rulings of the Deputy Commissioner excepted to by Grant, and in the failure of the Full Commission to correct them, Grant contends prejudicial error was committed. We agree.

The testimony of Dr. McQueen which was excluded by the Deputy Commissioner falls into two categories: evidence relating to causation of Grant's lung disease and evidence relating to the nature and extent of Grant's disability. The Commission found that Grant's occupational cotton dust exposure was a significant contributing factor to Grant's chronic obstructive lung disease. Grant concedes that causation is not at issue on this appeal. Any error in excluding Dr. McQueen's testimony on causation was plainly harmless.

The same is not true, however, for Dr. McQueen's testimony on the nature and extent of Grant's disability. Dr. McQueen saw Grant for a total of at least ten office visits between 7 January and 22 October 1982. It was Dr. McQueen who placed Grant on a one-month medical leave at her first office visit and advised her

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not to return to her work area. He also placed Grant on a six-month leave of absence on her next office visit, had her try various bronchodilators, and had a pulmonary function study performed. Dr. McQueen gave detailed testimony relating to Grant's physical condition throughout the time she was in his care. Nevertheless, a number of objections to his testimony were sustained by the Deputy Commissioner. For example, Dr. McQueen responded to a question that asked what his examination during a 25 February 1982 office visit consisted of and revealed, as follows:

I felt at that time that [the] patient was better. She was managing her activities of daily living, which is again improved from where she was initially, having shortness of breath at rest and later at mild exertion, and now she was able to take care of things around the house. I felt that with her weight up—she was gaining a couple of pounds and the COPD [chronic obstructive pulmonary disease] was still there—and I advised her at that time that maybe she should apply for her Social Security. We talked and I felt that she did have a chronic disease and that she would be totally disabled.

Perhaps the most critical testimony excluded by the Deputy Commissioner came in response to a question posed by Grant's counsel as to whether, in Dr. McQueen's opinion, Grant suffered from a permanent impairment of her ability to engage in activities requiring physical exertion on a prolonged or sustained basis as a result of her lung disease. Dr. McQueen testified:

In my opinion, due to [the] patient's objective studies on pulmonary functions and due to follow-up with her and following her from time to time, I find that she does have moderate to severe restrictive and obstructive disease and that she is permanently and totally disabled for any type of gainful employment that would require anything beyond mild exertion.

We next turn to the applicable law. The determinative test for the admission of expert testimony is "whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his [or her] expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978). Dr. McQueen testified that he is a physician

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specializing in family practice medicine and that in his practice he sees lots of chronic lung disease. Defendants argue that because Dr. McQueen is a family practitioner rather than a specialist in pulmonary diseases, as are Drs. Williams and Kunstling, he was not qualified to render an opinion as a medical expert on the nature and extent of Grant's disability. A similar argument was rejected in *Robinson v. J. P. Stevens & Co. Inc.*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982). In *Robinson*, the claimant's family physician testified "as an expert witness in general practice with experience in treating people with respiratory complaints." As such, this Court held he was qualified to give his opinion both as to the causation and the extent of the claimant's lung disease. In particular, he was allowed to testify that the claimant was "unable to engage in labor requiring exertion." The Court stated: "A medical witness need not, as a matter of law, be a specialist in a particular subject to give an opinion on it." 57 N.C. App. at 624, 292 S.E. 2d at 147.

A similar result was reached in *Bryant v. Sampson Memorial Hospital*, 72 N.C. App. 203, 323 S.E. 2d 478 (1984). In *Bryant*, this Court held that it was reversible error to exclude the expert testimony of a pathologist on the issue of proper treatment of decubitus ulcers on the ground he was not an expert in general medicine:

An expert witness is one who through study or experience or both is better qualified than the jury to form an opinion on a particular subject. See Brandis on N.C. Evidence, 2nd Rev. Ed., Sec. 133. We believe that a medical doctor of whatever specialty is better able to form an opinion as to medical treatment than the [lay people] who ordinarily comprise juries.

Id. at 204, 323 S.E. 2d at 479.

Applying the foregoing to the instant facts, it is clear that Dr. McQueen's testimony as to the nature and extent of Grant's disability was erroneously excluded. Dr. McQueen, an expert in family medicine with experience in the field of pulmonary diseases, treated Grant on a regular basis throughout 1982. Interestingly, Dr. Kunstling, a board-certified specialist in pulmonary diseases, admitted that he was "handicapped" in evaluating Grant's condition, in that her lung function fluctuated

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from day to day, and he had seen her on only a single occasion. Furthermore, the exclusion of the testimony was prejudicial error. That is, in light of the Commission's conclusion that Grant was not disabled, we cannot say that Dr. McQueen's testimony that she was totally and permanently disabled would not have affected the outcome.

IV

[2] Grant next contends that the Commission did not make findings of fact sufficiently specific for it to determine all questions relevant to the issue of disability. We agree. The Commission is the sole judge of the credibility of witnesses and may accept or reject any of a claimant's evidence. However, the Commission is required to make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant's disability. See *Cook v. Bladenboro Cotton Mills, Inc.*, 61 N.C. App. 562, 300 S.E. 2d 852 (1983); *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). Although the Commission's findings are conclusive on appeal if supported by competent evidence, its legal conclusions are reviewable by our appellate courts. *Hilliard v. Apex Cabinet Co.* Particularly, when the factual findings are insufficient to determine the rights of the parties, the court may remand to the Commission for additional findings. *Hilliard v. Apex Cabinet Co.*; *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E. 2d 743 (1982).

The term "disability" is defined in our Workers' Compensation Act as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. Sec. 97-2(9) (1979). It is well-settled that in this context, "disability" does not refer to physical infirmity, but to a diminished capacity to earn wages. *Priddy v. Cone Mills Corp.* Our Supreme Court has held that the determination whether a disability exists is a conclusion of law, and, as such, must be based upon findings of fact supported by competent evidence. *Hilliard v. Apex Cabinet Co.* Therefore, to enable a proper review of a conclusion concerning disability, the Commission is required to make specific findings of fact as to a plaintiff's earning capacity. *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E. 2d 766 (1982). The Supreme Court clarified what findings are necessary to support a conclusion that a worker is disabled in *Hilliard v. Apex Cabinet Co.*:

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We are of the opinion that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his [or her] injury of earning the same wages . . . earned before [the] injury in the same employment, (2) that plaintiff was incapable after his [or her] injury of earning [the] same wages earned before the injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

305 N.C. at 595, 290 S.E. 2d at 683; *see Priddy v. Cone Mills Corp.* (order must contain "more than mere recitals of medical opinions" to resolve issue of disability).

In light of the evidence adduced at the hearing, we are satisfied that, on the issue of Grant's disability, the factual findings made by the Industrial Commission are inadequate. Grant offered uncontradicted evidence that she worked for Burlington as a weaver and a smash operator, and she detailed the various duties and amount of exertion involved in each job—for example, that as a smash repairer she was required to pull heavy warps. The Commission found only that, during her employment for Burlington, Grant worked "in the weave room." Other factual findings are internally inconsistent. The Commission found, based upon competent evidence, that Grant had worked in the insurance industry as an insurance branch manager, that her work involved "soliciting business door-to-door," and that Grant is currently unable to perform duties requiring prolonged exertion. These findings are in conflict with the additional finding that Grant would be able to return to work in the insurance industry as it was an occupation that did *not* involve prolonged exertion.

The record also disclosed plenary and conflicting evidence concerning Grant's employment as a smash repairer in Burlington's Richmond plant, which plant processed only synthetic materials. Grant testified that although her duties as smash repairer were less strenuous than those as a weaver, sufficient exertion was involved so that, at the time Dr. McQueen advised her to stop working in January 1982, she was unable to perform the duties of a smash repairer and that it was necessary for other workers in the weave room to assist her. She also testified that there was dust in the weave room at the Richmond plant. Dr. Kunstling and Dr. Williams both expressed their opinions that ex-

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posure to synthetic yarn filaments could neither cause nor aggravate Grant's lung disease. Dr. Kunstling also testified that there are a number of possible explanations other than exposure to cotton dust for Grant's inability to perform the duties of a smash repairer in a factory processing synthetics, such as cigarette smoking of co-workers, room temperature, and the level of physical exertion required.

The Commission found that Grant had work experience in a synthetic textile mill, that she is unable to perform duties requiring prolonged exertion or work in an atmosphere of irritating dust or fumes, and that work in a synthetic textile mill is employment to which Grant is able to return. Based on the evidence summarized above, these findings pertaining to Grant's employment in a synthetic textile plant are clearly deficient. Not only do these findings fail to resolve evidentiary conflicts, *see Priddy v. Cone Mills Corp.* (findings required on conflicting evidence), they are inconsistent. In short, the factual findings in this case are insufficient to determine the rights of the parties on the issue of disability.

V

Concluding as we do that the Commission's findings on the issue of disability are not sufficiently specific, we do not reach Grant's third argument, that the findings of fact do not support the conclusions of law and the award of the Commission.

VI

[3] Defendants Burlington Industries and Liberty Mutual advance a single argument in their cross-appeal, and as it may be relevant on remand, we address it here. Defendants argue that because the Commission determined Grant was not disabled as a result of her chronic obstructive lung disease, it was error for the Commission to award compensation under N.C. Gen. Stat. Sec. 97-31(24) (1979). There is a conflict among cases from this Court as to whether benefits may be awarded under G.S. Sec. 97-31(24) for permanent damage to the lungs when there is no finding of disability resulting from occupational disease. In *Harrell v. Harriett and Henderson Yarns*, 56 N.C. App. 697, 289 S.E. 2d 846 (1982), *disc. rev. allowed*, 309 N.C. 191, 305 S.E. 2d 733 (1983), the Commission found that the plaintiff suffered from an occupational

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disease but was not disabled. It then awarded benefits under G.S. Sec. 97-31(24) for partial loss of lung function. The Court of Appeals reversed, holding that "injury caused by occupational disease does not fall within the scope of G.S. Sec. 97-31(24)," i.e., G.S. Sec. 97-31(24) does not apply to occupational disease.

Holdings contrary to that of *Harrell* were subsequently rendered in *Cook v. Bladenboro Cotton Mills, Inc.*, and *West v. Bladenboro Cotton Mills, Inc.*, 62 N.C. App. 267, 302 S.E. 2d 645 (1983). Both *Cook* and *West* held that G.S. Sec. 97-31(24) *does* apply to occupational diseases. In *West*, this Court further stated that disability resulting from occupational disease is a condition precedent to recovery under G.S. Sec. 97-31(24): before compensation can be awarded under N.C. Gen. Stat. Sec. 97-29 (Supp. 1983), Sec. 97-30 (Supp. 1983), or Sec. 97-31 (1979), "disability must exist." We note that *Harrell* is currently pending before our Supreme Court. Until such time as that Court renders its decision, we agree with *Cook* and *West* that occupational diseases are within the scope of G.S. Sec. 97-31(24). However, and especially since the issue is now before our Supreme Court, we disapprove of that portion of *West* that indicates a finding of disability—a diminished capacity to earn wages—is a condition precedent to recovery of benefits under G.S. Sec. 97-31(24).

We analyze the law thusly: N.C. Gen. Stat. Sec. 97-2(6) (Supp. 1983) defines a compensable injury as "injury by accident arising out of and in the course of the employment, and shall not include a disease in any form. . . ." N.C. Gen. Stat. Sec. 97-52 (1979), enacted subsequent to the original definitional statute, makes occupational diseases compensable. It provides: "Disablement or death of an employee resulting from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident. . . ." G.S. Sec. 97-31 contains a schedule of compensation "for disability during the healing period . . . in lieu of all other compensation," including "the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of" G.S. Sec. 97-31. G.S. Sec. 97-31(24). Awards under G.S. Sec. 97-31(24) are equitable in nature and within the Commission's discretion. *Id.* To obtain an award of benefits under any subsection of G.S. Sec. 97-31, a specific showing that the claimant has undergone a diminution in wage-earning capacity is not required.

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Instead, disability is presumed from the fact of injury. See *Key v. McLean Trucking*, 61 N.C. App. 143, 300 S.E. 2d 280 (1983) (applying G.S. Sec. 97-31(24); disability compensation under G.S. Sec. 97-31 is awarded for physical impairment irrespective of ability to work or loss of wage earning power); see also *Liles v. Charles Lee Byrd Logging Co.*, 309 N.C. 150, 305 S.E. 2d 523 (1983) (reaching similar result under G.S. Sec. 97-31(22)). Therefore, as "injury" includes disability resulting from occupational disease, and as disability is presumed from a showing of a scheduled injury under G.S. Sec. 97-31(24), we find no statutory justification for excluding loss of or permanent injury to the lungs resulting from occupational disease from the coverage of G.S. Sec. 97-31(24), and no statutory justification for making a specific finding of disability a condition precedent for recovery thereunder.

Apparently, the position taken in *Harrell* is that the language of G.S. Sec. 97-52 implicitly creates two legal categories of harm caused by occupational disease: (1) occupational disease causing "disablement or death," and (2) occupational disease causing injury that results in no disablement or death. Under *Harrell*, only the former are treated as "injuries by accident" and, therefore, are compensable under G.S. Secs. 97-29, 97-30 and 97-31. The latter category are treated as noncompensable by omission from the Act and from G.S. Sec. 97-52 specifically. Thus, an employee must always prove disability in order to be compensated for an injury caused by an occupational disease under the schedule of injuries in G.S. Sec. 97-31, even though an employee need not prove disability to be compensated for other types of injury by accident under the same statutory schedule. We reject this approach because it appears that the legislature intended to dispense completely with this arbitrary distinction when it enacted G.S. Sec. 97-52. Our holding requires that injury by occupational disease be treated the same as injury by accident, just as mandated by G.S. Sec. 97-52. We hold, then, that in all cases in which compensation is sought under G.S. Secs. 97-29 or 97-30, total or partial disablement must be shown. However, if compensation is sought in the alternative under G.S. Sec. 97-31, disablement is presumed from the injury and compensation is accordingly based on the schedule.

We observe that our holding today does not handicap the textile worker who is disabled as a result of damaged lungs. Such a claimant, who is able to establish impairment of his or her wage-

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earning capacity, will undoubtedly seek the greater mandatory benefits recoverable for total or partial disability under G.S. Sec. 97-29 and Sec. 97-30, rather than take a chance at a discretionary award made under G.S. Sec. 97-31(24). Furthermore, a contrary holding in this case would mean that while an employee who punctured a lung on the job and suffered lung damage or a loss of breathing capacity could obtain benefits under G.S. Sec. 97-31(24) without a showing of disability, a worker whose lungs were damaged as a result of employment in a textile mill would be foreclosed from obtaining any benefits whatsoever absent a showing of disability. Such a holding would, in our opinion, be contrary to both the letter and the spirit of our Workers' Compensation Act. See *Cates v. Hunt Construction Co., Inc.*, 267 N.C. 560, 148 S.E. 2d 604 (1966) (Workers' Compensation Act requires both Commission and courts to construe it liberally in favor of the injured worker).

VII

In conclusion, we vacate the opinion and award of the Full Commission, and remand this case so that the Commission may consider anew the issue of Grant's disability, taking into account the testimony of Dr. McQueen as well as all other competent evidence, and make factual findings on disability sufficiently specific to determine the rights of the parties. If upon remand the Commission concludes that Grant is not disabled as a result of an occupational disease, the award of benefits under G.S. § 97-31(24) is upheld.

Vacated in part and remanded.

Judge WEBB dissents.

Judge MARTIN concurs.

Judge WEBB dissenting.

I dissent to that portion of the opinion which holds that the plaintiff is entitled to compensation under G.S. 97-31(24). I believe the reasoning of *Harrell v. Yarns*, 56 N.C. App. 697, 289 S.E. 2d 846 (1982), *disc. rev. granted*, *Harrell v. Harriett and Henderson Yarns*, 309 N.C. 191, 305 S.E. 2d 733 (1983), is sound and we are

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bound by that case. Until the passage of G.S. 97-52 occupational diseases were not injuries by accident within the meaning of the Workers' Compensation Act. G.S. 97-52 provides in part:

Disablement or death of an employee resulting from an occupational disease . . . shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workers' Compensation Act.

There was not a finding of a disablement in this case and the plaintiff had not suffered from an accident within the meaning of the Workers' Compensation Act. She was not entitled to compensation under G.S. 97-31(24). *Cook v. Bladenboro Cotton Mills*, 61 N.C. App. 562, 300 S.E. 2d 852 (1983) and *West v. Bladenboro Cotton Mills*, 62 N.C. App. 267, 302 S.E. 2d 645 (1983) did not face this issue squarely as was done in *Harrell*.

ROBERT E. WALKER v. WESTINGHOUSE ELECTRIC CORPORATION

No. 8521SC95

(Filed 15 October 1985)

1. Master and Servant § 1— handbook not part of employment contract

Although language in an employee handbook stated that it would "become more than a handbook . . . it will become an understanding," the handbook did not become a part of plaintiff's employment contract where it was not expressly included in it and thus did not restrict defendant employer's right to terminate plaintiff's employment.

2. Master and Servant § 10— employment at will

Plaintiff worked as an employee at will, and his employment could be terminated at any time by his employer, where his contract of employment did not contain a specified term or fixed duration, plaintiff gave no consideration in addition to the usual obligation of service, and there was no evidence that the employer took advantage of plaintiff or that he did not receive full pay for his services.

3. Master and Servant § 10.2— wrongful discharge for raising safety concerns—insufficient forecast of evidence

Assuming that a cause of action exists for wrongful discharge in retaliation for raising safety concerns, plaintiff's forecast of evidence was insufficient to survive defendant employer's motion for summary judgment where it contained no suggestion of the length of the interval between the times when plaintiff raised safety concerns and his discharge; plaintiff's own evidence

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showed that most of the safety concerns raised were actually unpleasant working conditions about which little could be done and about which other workers had complained; and plaintiff presented no evidence from others who worked in the allegedly unsafe conditions and no evidence of state or federal safety requirements violated.

APPEAL by plaintiff from *Wood, William Z., Judge*. Judgment entered 29 August 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 30 August 1985.

This is an action for wrongful discharge. Plaintiff employee worked for three years as a senior electrician for defendant employer, for whom he had worked ten years altogether. Plaintiff's responsibilities at the time of his discharge included maintaining industrial machinery throughout a large factory building. He had no set work place or work schedule, and carried a radio pager to enable him to respond to breakdowns throughout the building. Plaintiff took breaks on an informal basis when work was slack.

Plaintiff was working on Saturday, 22 November 1980 but work was very slack. Plaintiff completed his rounds of the operating machines and he apparently had no other work to do. He went to the snack bar, bought a soft drink and crackers and then went into the adjacent company auditorium. There was a big-screen television set there. According to plaintiff, because he was interested in purchasing one, he flipped it from videotape play-back to regular reception and sat down to view it. He had been sitting there for about fifteen minutes when a plant supervisor came in. The supervisor told plaintiff to leave the plant immediately. Plaintiff was subsequently discharged permanently from his employment with defendant.

Plaintiff had no prior formal disciplinary actions. In the past, he had brought what he perceived to be safety concerns to the attention of supervisory personnel. Most of these were not strictly safety related, however, but involved unpleasant working conditions. Defendant's officials maintained that they had had many informal and undocumented counseling sessions with plaintiff, and that plaintiff's explanation for his presence in the auditorium was "completely fabricated."

Plaintiff had no written contract of employment, either individually or as a member of a collective bargaining unit. Shortly

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after beginning his employment with defendant, plaintiff received a copy of the employer's "Handbook for Employees" ("Handbook"), which was updated periodically by defendant. Employees had no official part in preparation of the Handbook. It contained the following provisions:

This manual is intended as an employee guide for explanation and interpretation of the policies and procedures which govern all employees at Westinghouse, Winston-Salem. Some of the policies are corporate-wide, and some have been established at our location with the help of all supervision. These policies will also be administered within the framework of all state and federal laws.

It is the responsibility of each management employee to fairly and consistently apply these policies to all employees.

Further, these policies have been adopted and endorsed by the Plant Manager and Staff.

* * *

This revised handbook has been prepared for all employees to use as a reference and to help our new employees get acquainted with our plant. It describes the relationship we have with our people . . . our obligations to you and your obligations to your fellow employees and the plant. Some of the obligations are in the form of policies and procedures . . . some a result of mutual trust . . . some a matter of conscience.

* * *

Those of you who are new to the Turbine Components "family" have been selected because we feel you are the type of individual who possesses the ability that will contribute to our continued success. As a new employee, I'm sure you will soon notice the willingness of our people to work together and resolve our problems together. It is this relationship that will result in your achieving your personal goals and our business goals. This handbook is our agreement on how we will operate our business. Read through it and discuss it with your supervisor. Then it will become more than a handbook . . . it will become an understanding.

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* * *

OUR

WINSTON-SALEM

PLEDGE

To insure that the Westinghouse Turbine Components Plant is a good place to work, management employes in our Plant pledge to honor these principles in our relations with you:

* You will be treated fairly, as an individual, with consideration and respect.

* You will be paid wages and salaries that on the average are equal to or higher than the average of those paid for comparable skill levels in the Plant's employment market area. We believe in paying a fair day's pay for a fair day's work.

* You will be provided the same liberal benefits that are enjoyed by employes of other Westinghouse Plants.

* Your well-being will be given full consideration in any decisions that may involve you.

* You will be given every consideration for self-improvement and advancement opportunities in our Plant and your Westinghouse service and qualifications will be given full consideration with respect to advancement.

* You will receive prompt handling—with fairness and in a friendly manner—of any problem that could be the cause of a complaint.

* You will be provided a clean, well-ventilated place in which to work.

* You will be provided year-round employment to the greatest practical extent.

* * *

RULES OF CONDUCT

In disciplinary situations, the supervisor will exercise discretionary judgment in administering discipline to take what-

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ever action is necessary, depending on the infraction of the rules. For consistency of administration, all disciplinary actions, other than formal verbal warnings, will be reviewed by the Personnel Relations Department prior to taking action. In infractions involving violations of the Rules of Conduct—Type A, the supervisor may suspend the employe pending an investigation and review of the infraction.

If disciplinary action is warranted, but not of the nature requiring suspension, the supervisor will notify the employe that he has committed an infraction of the Plant Rules of Conduct and he will inform him of the resulting disciplinary action after review with the Department Manager and Personnel Relations Department.

If the infraction is judged by the supervisor to warrant suspension, the supervisor will notify the employe that he has been suspended, obtain his identification badge and gate pass, and advise the employe that he will be notified within three (3) working days of the disposition of the case.

PLANT RULES AND REGULATIONS

The following is a list of the Plant Rules of Conduct that shows the appropriate disciplinary action for each. The rules are not all inclusive, but represent the type of conduct which cannot be condoned.

RULES OF CONDUCT

* In a plant community such as ours, there are certain regulations which govern our conduct as employes while on Company property, just as there are regulations governing us as citizens in the community in which we live or as members of clubs to which we belong. These regulations—which are an aid to making our Plant a safe, pleasant, productive and desirable place to work—are for general information and to assure uniform administration of disciplinary action if ever it is necessary.

* The rules shown are not all-inclusive but represent the type of conduct which cannot be condoned. They are divided into three main groups, depending upon the relative seriousness of the misconduct.

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The three groups of rules and punishments for first infractions were Type A, which "may result in immediate discharge"; Type B, which "may result in three days off without pay"; and Type C, which "may result in a written warning." Type A misconduct included "sleeping during working time" and "gross insubordination." Type B misconduct included "willful failure or refusal to carry out instructions" and "insubordination." Type C misconduct included "loitering" and "leaving job or work area" before end of work.

Defendant's supervisory personnel maintained that plaintiff's conduct was of Type A, justifying immediate discharge. Plaintiff brought the present action in December 1982, alleging that he was wrongfully discharged in violation of his contract of employment as established in the Handbook, that his discharge was contrary to public policy, that he had relied to his detriment on fraudulent representations in the Handbook, and that defendant's conduct constituted unfair and deceptive trade practices. Following discovery, defendant moved for and was granted summary judgment on all claims. Plaintiff appeals.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Herman L. Stephens, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Charles F. Vance, Jr., Guy F. Driver, Jr. and M. Ann Anderson, for defendant-appellee.

EAGLES, Judge.

Plaintiff has abandoned his unfair and deceptive trade practices claim before this court. The crucial questions remaining before us are (1) did defendant discharge plaintiff in violation of its contract of employment with plaintiff and (2) did defendant wrongfully discharge plaintiff in violation of public policy? We answer both questions in the negative.

I

A party moving for summary judgment must establish that there is no genuine issue of material fact or that it has a complete defense as a matter of law. *See Thomas v. Ray*, 69 N.C. App. 412, 317 S.E. 2d 53 (1984). The record must be viewed in the light most favorable to the non-movant, with all reasonable inferences therefrom. *Sharpe v. Quality Education, Inc.*, 59 N.C. App. 304,

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296 S.E. 2d 661 (1982). The movant's papers are scrutinized with care, while the non-movant's are treated indulgently. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). We have examined the record in light of these principles.

II

[1] In order to resolve the contract questions in this case, we first must determine what constituted the contract. Plaintiff contends that the contract included the Handbook; defendant contends in essence that the contract consisted merely of its agreement to pay plaintiff certain compensation for a certain amount of work, and that the Handbook did not become part of the contract. We are aware that a growing number of jurisdictions recognize that employee manuals purporting to set forth causes for termination may become part of the employment contract even in the absence of an express agreement. *See Annot.*, 33 A.L.R. 4th 120, Section 4[a] (1984). Courts have reached this result on various grounds, including that the employer, by issuing the manual (as opposed to requiring employees to acknowledge that they may be terminated at any time) has assumed an obligation to terminate only for cause, *see Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W. 2d 880 (1980); that the employee, by not looking for other work in reliance on the corporate manual, gave consideration to make the manual part of the contract, *see Wagner v. Sperry Univac*, 458 F. Supp. 505 (E.D. Pa. 1978), *aff'd*, 624 F. 2d 1092 (3d Cir. 1980) (mem.); or that the manual, having been promulgated after consultation with an employee committee, represented a contractual negotiating and bargaining process. *See Wernham v. Moore*, 77 A.D. 2d 262, 432 N.Y.S. 2d 711 (1980). We are also aware that there are strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice.

Nevertheless, the law of North Carolina is clear that unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it. *Smith v. Monsanto Co.*, 71 N.C. App. 632, 322 S.E. 2d 611 (1984); *Griffin v. Housing Authority*, 62 N.C. App. 556, 303 S.E. 2d 200 (1983); *Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 253 S.E. 2d 18, *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 810 (1979); *Cote v.*

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Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1982) (applying North Carolina law). The contract did not, under our law, include the Handbook. Despite its apparent promise to "... become more than a handbook . . . it will become an understanding . . .," the Handbook did not become an understanding binding on the employer.

III

Even if we were to assume *arguendo* that the Handbook had been part of plaintiff's contract of employment, it appears sufficiently well drafted that plaintiff nevertheless would be entitled to no relief. Though the Handbook does promise to "become more than a handbook . . . it will become an understanding," and acknowledges "the responsibility of each management employee to fairly and consistently apply" the policies in it, supervisory personnel retain final discretionary authority in disciplinary matters. The Handbook says: "In disciplinary situations, the supervisor will exercise discretionary judgment in administering discipline, to take whatever action is necessary. . . ." The Rules of Conduct expressly provide that they are not all-inclusive, and the described conduct simply "may result" in the various described disciplinary actions. While the Handbook appears to promise much, it contains little of substance to aid an employee being terminated. Accordingly, we must reject plaintiff's claim that he is entitled to relief under the contract including the Handbook.

IV

[2] A contract of employment which does not contain a specified term or fixed duration is ordinarily not enforceable. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). Since the Handbook was not a part of the contract, and the contract otherwise contained no specified term or duration, plaintiff worked as an employee at will. The contract could legally be terminated at any time at the will of either party. *Id.*; *Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976). There are certain limited exceptions to this rule.

A

If an employee gives some additional consideration in addition to the usual obligation of service, a contract for an indefinite term may become a contract for as long as the services are satis-

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factorily performed. *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985). In *Sides*, we recognized a claim for breach of an indefinite-term contract where the plaintiff alleged that she had moved from Michigan to Durham in reliance on promises that she would only be discharged for incompetence. *See also Fisher v. John L. Roper Lumber Co.*, 183 N.C. 486, 111 S.E. 857 (1922) (employee settled *bona fide* personal injury claim in exchange for employment "for the balance of his life"). *But see Malever v. Kay Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436 (1943) (employee moved to Charlotte from Fayetteville on promise of permanent employment; no permanent obligation to employ). No additional consideration appears from this record. Plaintiff testified that he occasionally looked for other jobs, but never stated that he passed up other employment in reliance on defendant's promises. The basic contract was a contract terminable at will.

B

A basic contract of employment at will may also be supplemented by additional agreements, which themselves, if enforceable according to the law of contracts, may include terms restricting the employer's right to terminate at will. In *Roberts v. Mays Mills*, 184 N.C. 406, 114 S.E. 530 (1922), the employer offered in January 1920 to pay an additional 10% bonus at Christmas 1920 for employees employed continuously since January. Plaintiff was discharged without bonus pay in September. He sued, alleging that he had intended to quit in January but was induced to stay on by the bonus offer. The Supreme Court held that he was entitled to the bonus up to the time of discharge, although it did *not* hold that plaintiff was protected from the discharge itself. *See also Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964) (rejecting employee's contention that contract was for life). We again find no consideration from plaintiff to defendant which would make the Handbook a supplemental agreement or otherwise restrict defendant's right to terminate.

C

Plaintiff contends that even a general hiring for an indefinite term may only be terminated "in good faith," relying on language in *Malever v. Kay Jewelry Co.*, *supra*. We note that the *Malever* court, although it could have grounded the concept of "good faith"

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in business necessity (closing of store), did not do so. Rather, it relied simply on the general law regarding employment at will, suggesting a limited conception of "good faith." See G.S. 25-1-201(19) ("good faith" means honesty in fact). Even if we were to apply a more broad definition of "good faith," see *Jaudon v. Swink*, 51 N.C. App. 433, 276 S.E. 2d 511 (1981), we must conclude that defendant did not unconscionably take advantage of plaintiff. In *Jaudon* "good faith" prevented defendants from using the services, if proven, of plaintiff without paying the contract price. Here there is no allegation that plaintiff did not receive full pay for his services. Plaintiff contends simply that defendant did not fairly apply the Handbook Rules of Conduct even though the Rules' application was left to defendant's discretion.

D

Plaintiff cites *dicta* in *Elmore v. Atlantic Coast Line R. Co.*, 191 N.C. 182, 131 S.E. 633 (1926), for the proposition that an employer may not feign dissatisfaction and dismiss an otherwise satisfactory employee at will. In *Elmore*, however, there was an employment contract which specifically stated that employees could not be discharged "without cause." The plaintiff there nevertheless proceeded on a tort theory.

We recognize the disparity of power in this type of situation and the potential for unfair results. However, we do not write on a clean slate. Applying the settled law of North Carolina, we must hold that plaintiff has shown no right to relief on his contract theory.

V

[3] In *Sides v. Duke University*, *supra*, we recognized a major exception to the general rule that an indefinite contract of employment is terminable at will. Plaintiff in *Sides* alleged that defendant had discharged her in retaliation for her refusal to perjure herself or withhold information in a trial involving its medical staff. We held that she stated a valid claim in both contract and tort for wrongful discharge, on the grounds that the public policy requiring truthfulness before our courts outweighed the employer's freedom to discharge employees at will. We recognized there that the employer's power to terminate "at will" cannot be absolute, in view of the many other societal obligations shared by employers and employees.

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Here plaintiff cites provisions of the Occupational Safety and Health Act of North Carolina, G.S. 95-126, that recognize employees' responsibility to help achieve safe working conditions and the role of employee initiative in safety matters. He argues that defendant's management personnel wrongfully discharged him in violation of this policy by firing him in retaliation for raising safety concerns. Defendant relies on *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E. 2d 272, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978), where we held that an employee at will has no action for retaliatory discharge. As we recognized in *Sides*, however, the General Assembly overruled *Dockery* on the specific question decided there, and the *Sides* court further eroded *Dockery*.

We hesitate however to establish a general cause of action for wrongful discharge for *any* employee discharged after raising safety concerns. Our decision in *Sides* rested on facts clearly showing a willful violation of the law and was consistent with other jurisdictions' insistence that the employer's conduct be in clear violation of express public policy to be actionable. See *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A. 2d 505, 12 A.L.R. 4th 520 (1980). We recognize that workplace safety is a major public issue. The legislature has worked to strike the proper balance between the employer's right to design and operate the workplace and the employee's right to work there free of threats to his or her life and health. We also recognize that some jobs are by their very nature dangerous, and that every safety concern raised by an employee cannot always be resolved to the satisfaction of all.

On the record before us, we believe that plaintiff failed to present a sufficient forecast of evidence to survive defendant's motion for summary judgment on this issue. In particular, the record before us contains no suggestion of the length of the interval between the time(s) when plaintiff raised safety concerns and his discharge. Even if they were all brought after the time when plaintiff became a senior electrician, the safety concerns nevertheless might predate plaintiff's discharge by as much as three years. By contrast, plaintiff in *Sides* was discharged within three months of the protected conduct, and had made protective requests for information in the interim. In addition, here plaintiff's own evidence showed that most of the safety concerns raised

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were actually unpleasant working conditions about which little could be done and about which other workers had complained. Plaintiff presented no evidence from others who worked in the allegedly unsafe conditions and no evidence of state or federal safety requirements violated. Assuming *arguendo* that a cause of action exists as alleged, we conclude that plaintiff's forecast failed to establish it at the summary judgment stage.

VI

Finally, plaintiff argues that defendant perpetrated fraud in representing to plaintiff and other employees that disciplinary actions would be governed by the Handbook. As discussed above, the Handbook did not become part of the contract of employment. Even if it had, its provisions allowed defendant discretionary disciplinary authority. Plaintiff cannot *legally* claim to have been misled by the Handbook, even though it would likely mislead one unschooled in the law of North Carolina.

VII

Based on this record and the settled law of this State, we must conclude that the trial court correctly applied the law to the facts before it. Summary judgment for defendant is accordingly

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. ANTHONY WOOD HEATH

No. 848SC1280

(Filed 15 October 1985)

1. Criminal Law § 91.1— continuances—exclusion of time from statutory speedy trial period—sufficiency of findings

The trial court's finding in each of five orders granting continuances that the continuance was granted "for the reasons above," that is, for the grounds stated in the motion for continuance, constituted a sufficient recitation of the court's reasons for making the finding set forth in G.S. 15A-701(b)(7) that "the ends of justice served by granting the continuance outweigh the best interests of the public and defendant in a speedy trial," and the 155-day delay caused by

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the continuances was properly excluded from the statutory speedy trial time limits where two of the motions recited as grounds that the trials of other cases had prevented the trial of this case, and the other three motions recited the unavailability of defendant's counsel as the reason for the requested continuance.

2. Constitutional Law § 51— delay between arrest and trial—constitutional right to speedy trial not violated

Defendant was not denied his Sixth Amendment right to a speedy trial by a five-month delay between arrest and indictment and an additional eight-month delay between indictment and trial since (1) the pre-indictment delay was not so unreasonable as to be oppressive *per se*, and defendant failed to show that such delay was due to any intentional conduct by the prosecutor or that the delay could have been avoided by reasonable effort; (2) defendant did not assert his right to a speedy trial until the day his trial began; and (3) defendant failed to show any prejudice from the delay other than a general allegation of faded memory.

3. Criminal Law § 50.1; Rape and Allied Offenses § 4.3— mental condition of rape victim—expert testimony

In a prosecution for rape and sexual offense against a thirteen-year-old victim, testimony by a clinical psychologist that *nothing* in the victim's record or current behavior indicated a mental condition which could cause her to fabricate her story of sexual assault was not testimony relating to a character or trait of character prohibited by G.S. 8C-1, Rule 405(a) but constituted proper opinion testimony on mental condition. G.S. 8C-1, Rule 702.

4. Criminal Law § 99.2— trial judge meeting with witness after testimony—no prejudicial expression of opinion

The trial judge's action in asking to meet with a medical witness in chambers following his testimony did not constitute a prejudicial expression of opinion on the credibility of the witness since any error in the judge's request to meet with the witness did not give rise to a reasonable possibility that, had such error not been committed, a different result might have been reached. G.S. 15A-1443(a).

5. Criminal Law § 113.1— failure to summarize evidence—no plain error

Failure of the trial judge to summarize defendant's evidence was not plain error entitling defendant to a new trial even though he did not object to the instructions at trial.

6. Criminal Law § 138— mitigating circumstance—honorable discharge from armed services

The trial court erred in failing to find the statutory mitigating factor that defendant had been honorably discharged from the armed services, G.S. 15A-1340.4(a)(2)(o), where defendant gave uncontradicted testimony that he had served in the Army for approximately six years and was honorably discharged.

Judge BECTON dissenting.

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APPEAL by defendant from *Barefoot, Judge*. Judgment entered 24 July 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 29 August 1985.

Defendant was indicted for two counts of second degree sexual offense and one count of second degree rape, all alleged to have been committed against Victoria (Vickie) Purser on 5 February 1983. The State offered evidence tending to show that Vickie Purser, 13 years of age, was visiting at a friend's house when defendant, who lived next door and was well-known to Vickie, forced her into his house and committed cunnilingus, fellatio and vaginal intercourse with her, against her will. Defendant, who was 56 years of age, admitted that Vickie and other neighborhood children visited him frequently but denied that he had ever assaulted or had any sexual contact with her. He offered evidence in refutation of Vickie's credibility concerning the incident and evidence in support of his own good character and truthfulness. A jury found defendant guilty as charged of all counts. The counts were consolidated and an active sentence of ten years was imposed. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Tiare B. Smiley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant.

MARTIN, Judge.

In his appeal, defendant contends that the trial court erred (1) in denying his motion to dismiss for failure of the State to provide him a speedy trial, (2) in admitting testimony by a clinical psychologist as to the absence of any mental condition in Vickie Purser which would cause her to fabricate her story, (3) in expressing an opinion as to the credibility of a witness, (4) in failing to summarize evidence favorable to defendant, and (5) in failing to find a statutory factor in mitigation of punishment. We have carefully considered each of defendant's assignments of error and find no prejudicial error in the trial. However, we must remand the case for a new sentencing hearing.

By his first assignment of error, defendant asserts that the trial court erred in denying his motion to dismiss the charges for

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the State's failure to provide him with a speedy trial. Defendant asserted violations of the provisions of G.S. 15A-701 *et seq.* and of his constitutional rights to a speedy trial. To determine this issue we must examine the facts of this case.

Vickie Purser first reported this incident to one of her teachers around the first part of June 1983. At that time, she reported that she believed the incident had occurred on 12 March 1983. A warrant was issued and served on defendant on 8 June 1983. Sometime later, Vickie recalled that the incident had occurred on 5 February. A probable cause hearing was conducted on 20 September 1983, at which time defendant was informed that the offense was alleged to have occurred on 5 February rather than 12 March. True bills of indictment were returned by the grand jury on 7 November 1983. Defendant's trial commenced on 16 July 1984, 252 days after he was indicted. During the period between indictment and trial, five written orders of continuance were entered by the court, excluding a total of 155 days from the time limits imposed by G.S. 15A-701(a1)(1).

[1] Defendant contends that each of these written orders for continuance was deficient, and therefore ineffective to exclude the period of continuance from the time limitations of the statute, because the orders fail to set forth, as required by G.S. 15A-701 (b)(7), the reason for the finding "that the ends of justice served by granting the continuance outweigh the best interests of the public and defendant in a speedy trial. . . ." We find no merit in this contention. Each of the orders followed a written motion for continuance, and appeared on the same preprinted form as the motion. Two of the motions recited as grounds that the trials of other cases had prevented the trial of this case, the other three recited the unavailability of defendant's counsel as the reason for the requested continuance. On each occasion, the court ordered the time excluded upon the finding:

Considering the factors set forth in G.S. 15A-701(b)(7), the Court finds as a fact that the ends of justice served by granting the continuance outweigh the best interests of the public and defendant in a speedy trial and therefore grants the continuance *for the reasons above.* (Emphasis added.)

We hold that the court's reference to the grounds stated in the motion for continuance is a sufficient recitation of its reasons for

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making the finding which G.S. 15A-701(b)(7) requires in order to exclude delays occasioned by the granting of a continuance.

[2] Defendant also asserts a violation of his right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. A determination of whether a criminal defendant has been deprived of his constitutional right to a speedy trial must be made in the light of the facts of each case, and involves a consideration of such factors as length of delay, reason for delay, defendant's assertion of the right to a speedy trial, and the prejudice to the defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972).

In the case *sub judice*, there occurred a five month delay between arrest and indictment, and an additional eight month delay between indictment and trial. The record does not disclose the reason for the pre-indictment delay. However, the length of delay, taken alone, is not dispositive, *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976). "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution." *Id.* at 148, 221 S.E. 2d at 250. In this case the delay between arrest and indictment was not so unreasonable as to be oppressive *per se*, and defendant made no showing that the delay in conducting the probable cause hearing or in obtaining the bills of indictment was due to any intentional conduct on the part of the prosecutor, or even that, by reasonable effort, the delay could have been avoided. The delay between indictment and trial appears from the record to be due primarily to congested court dockets and the unavailability, for various reasons, of defendant's trial counsel.

We also consider it significant that defendant did not assert his right to a speedy trial until the day his trial began, when he moved to dismiss the charges. Up to that point, defendant had not objected to any of the motions to continue his trial nor had he taken any other measures to secure for himself an earlier trial.

Finally, we must consider the extent of the prejudice resulting from the delay. Defendant contends that he was prejudiced by not knowing, until the date of the probable cause hearing, that the offense was alleged to have been committed on 5 February 1983 rather than 12 March 1983 as alleged in the warrant. This discrepancy, he claims, hampered his ability to present

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evidence of alibi, "in that he is unable to specifically recall what he did on February 5, 1983, and is unable to prepare a defense to the charge." General allegations of faded memory are not sufficient to show prejudice resulting from delay; defendant must show that evidence lost by delay was significant and would have been beneficial. *State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984). Defendant made no showing that any better alibi evidence would have been available to him had the original warrant alleged the date of the offense as 5 February 1983, or had the case been tried any earlier.

We conclude, upon balancing these factors, that defendant has failed to show that the delay between his arrest and trial was unreasonable, that it substantially prejudiced the presentation of his defense, or that he objected to it. This assignment of error is overruled.

[3] Defendant assigns error to the admission of certain testimony by Deborah Broadwell, an expert witness in the field of clinical psychology who testified for the State. On direct examination, Mrs. Broadwell testified that Vickie Purser was suffering from major depression when she was first seen at the Lenoir County Mental Health Center, exhibiting symptoms consistent with an adolescent's reaction to a sexual attack. On cross-examination, defendant's counsel questioned Mrs. Broadwell concerning various arguably inconsistent statements which Vickie Purser had made to personnel at the mental health center and were contained in her records. He had previously cross-examined Vickie as to whether she "had lied about so many other things" and had cross-examined Vickie's mother as to whether she had had a problem with Vickie "making up stories." Defendant's assignment of error relates to the following questions, answers, and rulings of the trial court which occurred during redirect examination of Mrs. Broadwell:

Q. Mrs. Broadwell, do you have an opinion satisfactory to yourself as to whether or not Vickie was suffering from any type of mental condition in early June of 1983, or a mental condition which could or might have caused her to make up a story about the sexual assault?

Objection

Court: Overruled

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Q. What is your opinion?

A. There is nothing in the record or current behavior that indicates that she has a record of lying.

Defendant argues that the admission of this testimony violates G.S. 8C-1, Rule 405(a) which provides in part: "Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." We disagree.

We observe first that the prosecutor's question was directed not to character but to the existence of a mental condition which might cause Vickie to fantasize or fabricate her account of the incident at the time she reported it in June 1983. Opinion testimony of an expert clinical psychologist is clearly admissible on the question of mental condition, the psychologist being in a better position than the jury to understand and interpret the mental behavior of an individual. See H. Brandis, *Stansbury's North Carolina Evidence* 2nd Rev. Ed. (1982), §§ 127, 132, 134; G.S. 8C-1, Rule 702. Even though not directly applicable because evidence of Vickie's prior sexual behavior was not offered, G.S. 8C-1, Rule 412(b)(4) suggests that expert psychological opinion testimony as to whether a complainant fantasized a sexual assault is admissible. Where, as here, it is suggested the victim may have had a history of fantasizing or fabricating stories, expert psychological or psychiatric testimony should be admissible to show that the victim does or does not suffer from a mental condition suggestive of fabrication. We hold that the objection to the question was properly overruled.

Admittedly, Mrs. Broadwell's answer was not strictly responsive to the question, however there was no motion to strike it. Even so, we believe that, taken in context, the clear import of the answer was that Mrs. Broadwell had found no evidence from the mental health records or from her treatment of Vickie to indicate that Vickie suffered from a mental condition indicative of fabrication of her story. Mrs. Broadwell did not conclude that Vickie was not, in fact, lying about the incident nor did she express an opinion that Vickie had actually been raped. Her testimony did not relate to the guilt or innocence of defendant as was the case in *State v. Keen*, 309 N.C. 158, 305 S.E. 2d 535 (1983). In *Keen* our Supreme Court ordered a new trial because a psychiatrist was permitted to testify that "an attack occurred on the victim" and

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"that this was a reality." Because defendant admitted that he and the victim were together at the time of the alleged attack, the Court found that the psychiatrist's testimony was a clear expression of opinion as to defendant's guilt. Mrs. Broadwell's response was not an expression of an opinion as to defendant's guilt, rather it was an opinion concerning a mental condition, which is properly the subject of expert testimony. This assignment of error is overruled.

[4] By his next assignment of error, defendant contends that the trial judge impermissibly expressed an opinion concerning the credibility of Dr. Rudolph Mintz, who testified for the prosecution. After Dr. Mintz completed his testimony, the judge stated: "Excuse me just a minute. I want to speak to the doctor." The record reflects that the judge met briefly with Dr. Mintz in chambers. Defendant contends that, by his actions, the judge indicated to the jury that he placed particular confidence in the witness's testimony.

It is well established in North Carolina that trial judges must not directly or indirectly suggest, by words or conduct, an opinion that bears upon the credibility of a witness or the weight to be given his testimony. *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966). Our Supreme Court has suggested, without deciding, that a trial judge who engaged in conversation with a witness at the bench, after the witness had testified, may have improperly suggested an opinion as to the credibility of the witness. *See State v. Myers*, 309 N.C. 78, 305 S.E. 2d 506 (1983). But not every impropriety on the part of the judge results in prejudicial error; whether the judge's actions amount to reversible error is a question to be considered in light of all of the circumstances, and the burden is on the defendant to show prejudice. *State v. Blackstock*, 314 N.C. 232, 333 S.E. 2d 245 (1985). In order to show prejudice, the defendant must meet the requirements of G.S. 15A-1443(a) by showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983).

Dr. Mintz, an expert witness in the field of obstetrics and gynecology, testified that he found upon a physical examination of Vickie Purser that her vaginal opening had been penetrated in-

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dicating to him that she had had sexual intercourse "more than once and less than five times." He did not render any opinion as to with whom or when the intercourse had taken place or as to whether or not it was forcible. Although we believe that the judge should have avoided any intimation of familiarity with the witness, we are satisfied, under the circumstances of this case, that the judge's request to speak with Dr. Mintz could not have amounted to error giving rise to a reasonable possibility that, in the absence of the request, a different result might have been reached. This assignment of error is overruled.

[5] Defendant next assigns as error the failure of the trial judge to summarize his evidence while instructing the jury. Our review of the record reveals that defendant failed to object to the jury instructions at trial. He is therefore precluded from raising the issue on appeal unless the court's failure to summarize the evidence can be said to be plain error. *State v. Bennett*, 308 N.C. 530, 302 S.E. 2d 786 (1983); N.C. R. App. P. 10(b)(2). This issue has been squarely addressed in *State v. Eason*, 312 N.C. 320, 321 S.E. 2d 881 (1984), where the Supreme Court held that the failure of the trial judge to summarize defendant's evidence is not plain error.

[6] By his final assignment of error, defendant contends that the trial court erred in failing to find a statutory mitigating factor. Defendant was convicted of three Class D felonies; the presumptive sentence for each offense is twelve years. The court consolidated all of the offenses and imposed a ten year sentence. Pursuant to G.S. 15A-1444(a1), defendant has no right to direct appeal of his sentence since the prison term imposed is less than the presumptive term. Recognizing that he has no appeal as of right from the sentence, defendant asks that we treat his argument as a petition for writ of certiorari to review this issue. In the exercise of our discretion, we will allow the petition and review the issue.

Defendant testified that he had served in the Army for approximately six years and was honorably discharged. This testimony was uncontradicted, the record reveals no reason to doubt its credibility, and it supports the existence of a mitigating factor specifically listed in G.S. 15A-1340.4(a)(2). Although the trial judge found, in mitigation, that defendant had a good reputation and no

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criminal record, there is no indication that he considered the defendant's honorable military service. We are unable to say that, had he considered the statutory factor, it would have had no additional mitigating value. Therefore we must hold the failure of the court to find this statutory mitigating factor to be error requiring that defendant be afforded a new sentencing hearing. *See State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984).

No error in the trial.

Remanded for a new sentencing hearing.

Judge WEBB concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Because I disagree with the majority's analysis regarding the admissibility of Mrs. Broadwell's testimony, and because I believe the testimony was prejudicial, I dissent.

The majority observes that "the prosecutor's question was directed not to character but to the existence of a mental condition which might cause Vickie to fantasize her account of the incident." *Ante* p. 270. On the facts of this case, the distinction between a character trait of lying or fantasizing and a mental condition causing one to lie or fantasize is subtle at best and, perhaps, illusory. In any event, Mrs. Broadwell, as an expert witness, clearly expressed an opinion on the truthfulness of the witness (Vickie).

I believe that the last sentence in Rule 405(a)—"Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior"—controls this assignment of error. Rule 405, which delineates the permissible methods of proving character, is identical to Federal Rule 405 except that the last sentence was added by our legislature. Rule 608(a) provides:

(a) *Opinion and reputation evidence of character.*—The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence

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may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

The Commentary explains that this Rule is identical to its federal counterpart except for the addition of the language "as provided in Rule 405(a)." The Commentary continues: "The reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible." Thus, if Mrs. Broadwell expressed an expert opinion on the credibility of the witness, as I believe she did, her opinion should have been excluded. This case was close, and Mrs. Broadwell's opinion that "nothing . . . indicates that [Vickie] has a record of lying" could have tipped the balance since it prejudicially suggests that the complainant was truthful in her account of the incident with the defendant.

I also cannot subscribe to the view that Rule 412(b)(4) implicitly permits expert psychological or psychiatric opinion as to whether a complainant fantasized the act involved. Rule 412 relates only to the admissibility of evidence of sexual behavior, not of a character for truthfulness, and it was enacted to deal with the special and unique problems presented by the attempt to introduce evidence of the complainant's past sexual behavior. In the case at bar, neither the question nor the answer involved such evidence. The question asked about the evidence of the complainant's "mental condition," and the answer involved her "record of lying."

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PATRICIA S. HELMLY, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF HER DECEASED HUSBAND, VERNON RALPH HELMLY v. THOMAS E. BEBBER, SHERIFF OF ALEXANDER COUNTY, NORTH CAROLINA, HARRY ROBERTSON, CECIL R. FRY AND HERSHELL TEAGUE, COMMISSIONERS OF ALEXANDER COUNTY, NORTH CAROLINA, AND ALEXANDER COUNTY, NORTH CAROLINA

No. 8422SC1347

(Filed 15 October 1985)

Sheriffs and Constables § 4; Convicts and Prisoners § 3— suicide of inmate— wrongful death action—summary judgment for sheriff improper—summary judgment for county proper

Summary judgment should not have been granted for defendant sheriff in a wrongful death action arising from the suicide of plaintiff's husband in the sheriff's jail, but summary judgment was correctly granted for the county and the county commissioners, where plaintiff's forecast of evidence showed that plaintiff told the dispatcher that her husband had checked out of the psychiatric ward at a hospital that morning for drug abuse, was crazy, and was dangerous to himself and others; plaintiff told sheriff's deputies that defendant was dangerous to himself and others; plaintiff's daughter told a lieutenant that her father was in a very bad condition, needed mental help, and was dangerous to himself and others; and one or both of the officers who arrived at plaintiff's house were aware that plaintiff's husband was drunk, had beaten his wife and daughter and was headed up the stairs toward his wife and children with a cinder block raised above his head when a lieutenant stopped him, had torn up the house, had rammed his truck into the house, and showed concern only for his pickup truck. Plaintiff was not required to use the magic word "suicide" in order to get to the jury.

APPEAL by plaintiff from *Collier, Judge*. Order entered 8 October 1984 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 21 August 1985.

Randy D. Duncan for plaintiff appellant.

David P. Parker for defendant appellees.

COZORT, Judge.

On 24 November 1982, plaintiff's husband committed suicide in the Alexander County Jail by hanging himself with his belt from the cell bars. On 15 May 1984 plaintiff filed an amended complaint in this wrongful death action alleging that defendants were negligent in failing to take reasonable measures to prevent her husband's suicide. Defendants moved for summary judgment on

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24 July 1984. The motion was granted by Judge Collier on 8 October 1984. We reverse in part and affirm in part.

A forecast of plaintiff's evidence tends to show the following:

On Monday, 22 November 1982, plaintiff's husband, Vernon Helmly (hereinafter "Helmly"), voluntarily entered the psychiatric ward of Catawba Memorial Hospital for drug abuse treatment. On Wednesday morning, 24 November 1982, against his doctor's and wife's wishes, he discharged himself from the hospital. Upon his discharge, Helmly repeatedly called his wife at work and later at home asking her to pick him up and bring him home. Eventually, Helmly got a ride home around 6:10 p.m.

Prior to her husband's returning home, plaintiff called Robert P. Davis, Magistrate for Alexander County, and inquired about having him committed. Plaintiff told Magistrate Davis that her husband had checked out of the psychiatric ward of Catawba Memorial Hospital against his doctor's wishes; that he had been drinking; that he had been on drugs; and that he was "dangerous to himself and others." Davis advised plaintiff that since her husband was currently in an adjacent county (Catawba), she would have to call the Catawba County Magistrate.

When Helmly arrived home around 6:10 p.m., he was drunk and wanted the keys to his truck. When plaintiff would not give him the keys, he became belligerent and started breaking and throwing dishes and furniture. Helmly beat his wife and daughter Kathey. Plaintiff went next door to her neighbor's house and called the sheriff's department. Plaintiff spoke with the dispatcher, gave him her name and address, and told him (1) her husband had checked out of the psychiatric ward at Catawba Memorial Hospital that morning for drug abuse; (2) he was very dangerous and was breaking everything in the house; (3) she was scared to death and her husband was crazy. Plaintiff talked with the dispatcher between three and five different times before sheriff's deputies arrived at her house. Sometime during these conversations she told the dispatcher that her husband was "dangerous to himself and others" and that her husband, who by now had obtained the keys to the truck, was ramming the truck into the house. Helmly had driven the truck repeatedly into their car pushing the car through a garage wall and had rammed the truck into the house.

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Lt. Gerald Dial of the Sheriff's Department arrived at the scene at approximately 7:02 p.m. At the Helmly residence Lt. Dial saw that the front of the pickup truck was damaged, the back of the car was badly damaged, and the back wall in the garage had a big hole in it. Lt. Dial observed Mr. Helmly standing at the front door of the residence with a cinder block in his hand. Helmly had broken the window out beside the door. Helmly's son was trying to keep Helmly from reaching inside the window. Before Lt. Dial got to Helmly, Helmly had gotten the front door open and was going up the stairs with the cinder block raised above his head with both hands. Lt. Dial saw Helmly's wife, daughter, and son at the top of the stairs. Lt. Dial noticed that Mrs. Helmly's face was bloody and Kathey Helmly had some blood or bruises on her. Lt. Dial overtook Helmly just before he got to the top of the stairs. Lt. Dial calmed Helmly and took him into custody.

Another officer, Deputy Chris Bowman, and an ambulance arrived a few minutes later. Deputy Bowman went to the patrol car where Helmly was seated and started talking to Helmly. Deputy Bowman noticed Helmly had blood on his hands, and he asked Helmly if he needed the EMTs to take a look at him. Helmly said he did not want the EMTs to look at him. Deputy Bowman could smell a strong odor of alcohol about Helmly. Helmly asked Deputy Bowman how bad his pickup was damaged. Helmly told Deputy Bowman that he had run his truck into the back of the car and that he had run the truck into the house. Deputy Bowman told Helmly that the front end of the truck had been damaged and that "seemed to satisfy" Helmly, though he was still mad at his family.

Plaintiff was taken to the hospital. At the hospital, plaintiff's daughter told Lt. Dial that her father was in "a very bad condition," he needed "mental help," and he was "dangerous to himself and others." Plaintiff maintains that she also told the deputies that her husband was "dangerous to himself and others."

Once Helmly was taken into custody he was brought before Magistrate Davis for a bail hearing and commitment proceeding at approximately 8:45 p.m. He was charged with assault on a female and assault inflicting serious injury and was placed in cell D-1, the "drunk tank." Bond was set at \$500. At that time, Helmly was the sole occupant of cell D-1, and the only jailer on duty was

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Loy Hensley, the radio dispatcher, although there were other deputies in the office. The cell block was not visible from the office or from the radio dispatch center where Hensley was stationed. A closed-circuit monitoring system had been installed in the jail but was not functioning at the time.

Prior to plaintiff's arrival at Magistrate Davis's office, Lt. Dial related to the magistrate plaintiff's desire to see about getting Helmly psychiatric treatment. Plaintiff arrived at the Sheriff's office from the hospital between 9:50 and 10:15 p.m. and proceeded to the magistrate's office with her son, her daughter, and a neighbor. During the discussion with the magistrate, plaintiff, as well as her neighbor, Sharon Cruzan, related to the magistrate the troubled history of Mr. Helmly.

Mrs. Cruzan told Davis of Helmly's recent threats of suicide. Plaintiff related her husband's history of alcoholism and psychiatric treatment and expressed her opinion that he was suicidal. Plaintiff admits this was the first time she had told any law enforcement figure that her husband might try to commit "suicide."

During the discussion with the magistrate, a groan was heard from the cell block area. Magistrate Davis remarked "Well, Vernon [Helmly] must be waking up." Helmly had been "hollering" off and on since he had been placed in the cell at approximately 9:00 p.m. At about 10:25 p.m., Officer Stan Durmire went to the cell block door and called to Helmly. At the earlier bail hearing, the prisoner had indicated his desire to remain at the jail overnight; now he told Durmire he "wanted out of the jail." Durmire responded that he would "check on seeing about getting him out." At about the same time, the meeting in Davis's office concluded, and plaintiff and the others left.

Durmire was met by the magistrate, who informed him and the other deputies of plaintiff's statements that Helmly was suicidal. Officers Durmire and Hensley returned to the cell, where, at approximately 10:38 p.m., they found the prisoner hanging by his belt from the cell bars. Lt. Dial and others were called to assist in loosening the tension on the belt by holding Helmly up while Officer Hensley returned to the office to obtain keys to the cell and to notify emergency medical personnel stationed across the street. The EMS unit arrived approximately one minute later. The two members of the EMS squad cut down the belt and began

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cardiopulmonary resuscitation on Helmly. The prisoner was pronounced dead at Alexander County Hospital at approximately 11:22 p.m.

The trial court granted summary judgment for all defendants, including Alexander County, the Commissioners of Alexander County, and the Sheriff of Alexander County. On appeal, neither the plaintiff nor the defendants attempt to make distinctions among the three specific defendant entities and the obligations and duties imposed on each. In the briefs, however, both plaintiff and defendants have concentrated on the defendant sheriff and his duty to the plaintiff's husband. Thus, the primary issue to be determined on this appeal is whether the plaintiff forecast sufficient evidence to go to the jury on the question of whether the sheriff was liable for negligently failing to keep Helmly from harming himself. To properly decide that issue, we must first analyze the duty of care owed by a sheriff to his prisoners. A recent annotation described the general rule as follows:

In accordance with the general rule that a duty of reasonable care is owed by prison or jail authorities to a prisoner to keep him safe from unnecessary harm, the courts which have considered the question . . . have generally recognized that if such authorities know or have reason to believe that the prisoner, unless forestalled, might do harm to himself or to others, reasonable care must be used by those authorities to assure that such harm does not occur.

Annot., 79 A.L.R. 3d 1210, 1214 (1977).

Whether a sheriff may be held liable under the theory of negligence for the suicide of a prisoner in his custody does not appear to have been squarely decided in this jurisdiction. In *Dunn v. Swanson*, 217 N.C. 279, 7 S.E. 2d 563 (1940), however, our Supreme Court held that the plaintiff had stated a cause of action when she alleged that the sheriff was negligent for placing her weak, sick and helpless husband in a cell with a violently insane man who during the night killed him by beating him with a leg torn from a table which had been left in the cell by the sheriff and jailer.

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Likewise, in *Hayes v. Billings*, 240 N.C. 78, 81 S.E. 2d 150 (1954), the court held that a cause of action had been stated against the Sheriff in a wrongful death action by allegations that: (1) the sheriff had incarcerated the decedent with full knowledge on the part of the defendant Sheriff that the decedent was without his mental capacity and had no knowledge as to his acts and was likely to do violence to himself because of his mental condition; (2) the Sheriff failed to lock the decedent in a place of safety but permitted him to be free in a dangerous and hazardous place, knowing full well, or being in a position where he should have known, that the decedent was likely to suffer death or great bodily harm because of the hazardous condition with respect to a well or open space in the jail's upstairs hallway where the decedent had been left free to roam; and (3) the decedent had fallen from the upstairs hallway of the jail to the concrete floor below, sustaining injuries from which he later died.

More recently, in *Williams v. Adams*, 288 N.C. 501, 219 S.E. 2d 198 (1975), the Supreme Court held that a complaint against a sheriff should not have been dismissed when it claimed the decedent's wrongful death was caused by the negligence of the sheriff's officers in not providing proper medical attention. In that case, Justice Moore stated the following:

[T]he author of a note in 19 N.C. L. Rev. 101 (1940-1941) states that *Dunn v. Swanson*, *supra*, is in accord with the general rule that "a prison official is liable when he knows of, or in the exercise of reasonable care should anticipate, danger to the prisoner, and with such knowledge or anticipation fails to take the proper precautions to safeguard his prisoners."

Id., 288 at 504, 219 S.E. 2d at 200.

These cases compel our holding that the standard of reasonable care is applicable in cases involving the suicide of a prisoner. Whether the custodian of the jail has reason to believe the prisoner might harm himself and has exercised reasonable care to prevent such harm are normally questions of fact for the jury:

In determining whether, in cases involving actions for damages arising out of a prisoner's self-inflicted injuries or suicide, jail or prison authorities have executed their duty of

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reasonable care to keep a prisoner safe and free from harm, the courts have recognized that certain factors, such as the prisoner's mental state—whether he was sane or insane, severely depressed, psychotic, or evidencing other symptoms of mental disturbance—or his physical condition—whether he was drunk, and if so, whether he was in a completely helpless state—are to be taken into consideration. It has been held that the drunkenness of the prisoner affects the degree of care owed to the extent that the jail or prison authorities must be mindful of his helpless condition in their treatment of him and must recognize that one in such a state cannot exercise even that ordinary care for his own safety which is expected of a reasonable person. Similarly, where a prisoner's mental condition is substantially impaired and the authorities know or should know this fact, the courts have determined that what would constitute the reasonable care of the prisoner demanded by law depends on the circumstances of the given case, and have indicated that whether the amount of supervision provided for the prisoner was adequate, and whether the articles left with the prisoner could naturally be assumed to be used as instruments of suicide, were questions to be decided by the jury.

Annot., 79 A.L.R. 3d 1210, 1214-15 (1977).

Since "it is usually the jury's prerogative [*sic*] to apply the standard of reasonable care in a negligence action, . . . summary judgment is . . . appropriate only in exceptional cases where the movant shows that one or more of the essential elements of the claim do not appear in the pleadings or proof at the discovery stage of the proceedings." *Ziglar v. E. I. Du Pont De Nemours and Co.*, 53 N.C. App. 147, 150, 280 S.E. 2d 510, 513, *cert. denied*, 304 N.C. 393, 285 S.E. 2d 838 (1981). Thus, when defendants moved for summary judgment in this case they undertook the burden of showing that plaintiff would not be able to prove at trial the essential elements of her negligence claim: "(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach; and (4) loss because of the injury. [Citation omitted.]" *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E. 2d 190, 194 (1980).

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In this case defendants argue that plaintiff has not come forward with sufficient evidence that Helmly's "suicide" was foreseeable, that is, plaintiff's evidence is not sufficient to show that defendants knew or should have known that Helmly might harm himself. Foreseeability of injury is an essential element of proximate cause. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Proximate cause is a jury question. *Jones v. Horton*, 264 N.C. 549, 142 S.E. 2d 351 (1965). Defendants argue that "[s]tating the term . . . 'dangerous to himself and others' was insufficient to make the deputies aware that Helmly was suicidal."

The forecast of plaintiff's evidence, if believed by the jury, shows that:

1. Plaintiff told the dispatcher that her husband had (a) checked out of the psychiatric ward at Catawba Memorial Hospital that morning for drug abuse; (b) he was crazy, and (c) he was "dangerous to himself and others";
2. Plaintiff told the sheriff's deputies defendant was "dangerous to himself and others";
3. Plaintiff's daughter told Lt. Dial her father (a) was in "a very bad condition," (b) needed "mental help" and (c) was "dangerous to himself and others";
4. One or both of the officers that arrived at plaintiff's house were aware that Helmly (a) was drunk, (b) had beat his wife and daughter and was headed up the stairs towards his wife and children with a cinder block raised above his head when Lt. Dial stopped him, (c) had torn up the house, (d) had rammed his truck into the house, and (e) showed concern only for his pickup truck.

This is sufficient evidence from which a jury could reasonably infer that the sheriff's deputies had been put on notice that Helmly might harm himself.

Under the circumstances of this case plaintiff was not required to use the magic word "suicide" in order to get to the jury. Plaintiff is entitled to have the jury decide whether it was foreseeable that Helmly might harm himself and, if so, whether the defendant sheriff exercised reasonable care to prevent such

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harm. It was error to grant defendant sheriff's motion for summary judgment.

As to the County and the County Commissioners, plaintiff has failed to produce evidence which would prove that either the County or its Commissioners had any duty which was not met. Summary judgment was correctly granted for Alexander County and the County Commissioners.

Affirmed in part; reversed in part.

Chief Judge HEDRICK and Judge ARNOLD concur.

HOWARD R. WILLIAMS, BARBARA B. WILLIAMS, KENNITH P. WHICHARD, JR., AND WHICHARD INVESTMENTS, INC. v. DAVID L. JENNETTE AND ANNIE LAWRIE JENNETTE AND W. W. PRITCHETT, JR., TRUSTEE

No. 841SC1283

(Filed 15 October 1985)

1. Clerks of Court § 1; Rules of Civil Procedure § 6— additional extension of time to file complaint— authority of clerk

The clerk of the trial court had statutory authority to extend the time for plaintiff to file the complaint for a period in addition to the original twenty-day extension. G.S. 1A-1, Rule 6(b); G.S. 1-7.

2. Pleadings § 9.1; Rules of Civil Procedure § 6— time for answer expired— motion for additional time— clerk without authority to determine— erroneous entry of default by clerk

Once the original time for filing answer had elapsed, the clerk was without authority to grant an extension of time for filing answer; rather, the motion for an extension of time had to be decided by a judge and could be allowed only for excusable neglect. The clerk erred in entering default judgment against defendants while their motion for an extension of time to file answer was pending since the clerk, in essence, exercised the trial judge's discretion to determine the motion for an extension of time. G.S. 1A-1, Rule 6(b); G.S. 1-7.

3. Judgments § 14; Rules of Civil Procedure § 55— default judgment after appearance by defendant

Once a party has made an appearance, a default judgment can be made only by a judge, not a clerk, upon three days notice. Therefore, a default judg-

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ment entered by a clerk was void where defendants never received notice and had made an appearance by filing a motion for an extension of time to plead.

4. Pleadings § 9.1— granting of additional time to file answer

The trial judge did not err in granting defendants' motion for additional time to file answer after the original time had expired where the judge indicated that the extension was granted in his discretion and the record, taken as a whole, supports a finding of excusable neglect.

5. Fraud § 12; Vendor and Purchaser § 6— misrepresentations in sale of undeveloped land—insufficient evidence of fraud

Plaintiffs failed to make out a *prima facie* case for the fraudulent sale of land in its natural, undeveloped state where plaintiffs alleged that defendant sellers falsely represented that the land could be developed for residential purposes and the timber removed therefrom, but plaintiffs failed to allege that defendants inhibited plaintiffs from inspecting or inquiring about the land or that defendants had and withheld unique knowledge about the property.

APPEAL by plaintiffs from *Watts, Judge*. Orders entered¹ 2 April, 3 May and 22 August 1984 in Superior Court, CHOWAN County. Heard in the Court of Appeals 20 August 1985.

Willis A. Talton for plaintiff appellants.

Pritchett, Cooke & Burch, by William W. Pritchett, Jr., for defendant appellees.

BECTON, Judge.

In this action for fraud and misrepresentation, the plaintiffs, Howard and Barbara Williams, Kenneth Whichard and Whichard Investments, Inc., alleged the following facts in their Complaint: The defendants, David and Annie Jennette, advertised for sale a 346.2 acre wooded tract along the Chowan River and Albemarle Sound. Mr. Jennette, holding himself out as an expert, represented that the land could be developed for residential purposes, showed plaintiffs a map of a proposed development, and advised plaintiffs that timber worth \$75,000 could be severed and sold. The plaintiffs were taken to the property by Mr. Jennette in a boat, and the property appeared to be as represented. The plaintiffs, relying on Jennette's representations and experience, pur-

1. By stipulation of the parties, all orders were entered out of session as follows: 2 April 1984 in Gates County, 3 May 1984 in Perquimans County, and 22 August 1984 in Pasquotank County.

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chased the property and attempted to build a road through the tract, but they were told that a road was not feasible and could not be supported because there were fourteen feet of peat on the ground. After much delay, plaintiffs finally contracted with a logging company to remove the timber, but their special equipment, designed to operate in peat, sank and had to be removed with other equipment. The representations that the land could be developed and the timber removed were false, made with the intent to deceive and induce reliance, and did in fact deceive plaintiffs who were damaged by their reliance. Plaintiffs sued for \$86,890.22 in damages, the money paid by plaintiffs up to the time of suit.

Plaintiffs commenced their suit on 12 October 1983 by filing a Summons and an Application and Order Extending Time to File Complaint. Time to file the Complaint was extended to 1 November 1983, but on that date plaintiffs obtained an order from the trial court clerk extending the time to file to 21 November 1983. The Complaint was filed on 21 November. The Complaint and Summons were served on defendants Jennette on 23 November and on defendant Pritchett on 30 November 1983. Pritchett, the Jennette's attorney, assumed he had been served the same day the Jennettes had been served, and on 28 December 1983, before his thirty-day period to answer would lapse, obtained from the clerk an enlargement of time for all the defendants. On 29 December, the clerk, realizing that the thirty-day period for the Jennettes had already lapsed, rescinded the enlargement of time as to the Jennettes, *ex parte*. Thereupon, the plaintiffs dismissed the defendant Pritchett and filed with the clerk a motion for judgment by default against defendants Jennette. The clerk entered default and granted a judgment by default against the Jennettes the same day, 29 December 1983.

On 3 January 1984, the Jennettes moved the trial court to set aside the entry of default and judgment by default, and on 20 January 1984, they moved to dismiss plaintiff's action under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 2 April 1984, the trial court set aside the entry of default and the judgment by default and extended the Jennettes' time to answer the Complaint to 20 April 1984. On 3 May 1984, the trial court denied plaintiffs' motions to dismiss the defendants' Rule 12(b)(6) motion and to strike the Answer. On 22 August 1984, the trial court

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granted defendants' motion for summary judgment, and the plaintiffs appeal.

Plaintiffs contend that the trial court erred by (1) setting aside the entry of default; (2) setting aside the judgment by default; (3) allowing defendants an extension of time to plead; and (4) granting summary judgment in favor of the defendants. Defendants assert that the plaintiffs' action abated when the plaintiffs failed to file a complaint on 1 November 1983, because the clerk exceeded his authority by extending plaintiffs' time. We disagree with all plaintiffs' and defendants' assertions and hold that summary judgment was properly granted.

I

[1] We summarily dispose of the argument that the plaintiffs' action abated on 1 November 1983. The clerk of the trial court may extend the time for filing a complaint for twenty days upon application by the plaintiff showing the nature and purpose of the action. Rule 3, N.C. Rules Civ. Proc. (1983). The Jennettes contend that the clerk may not thereafter extend additional time to file the complaint. We disagree. Rule 6, N.C. Rules Civ. Proc. (1983) provides:

(b) *Enlargement.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, *the court* for cause shown may at any time in its discretion with or without motion or notice order the period enlarged *if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge* may permit the act to be done where the failure to act was the result of excusable neglect.

(Emphasis added.) The use of "court" for timely requests and "judge" for untimely motions was not inadvertent. N.C. Gen. Stat. Sec. 1-7 (1983) provides the explanation:

In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular session

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of the court, in which cases the judge of the court alone is meant.

Thus, the clerk had the authority by statute to extend the plaintiffs' time. The motion requesting the extension alleged good cause for an extension, and the clerk did not abuse his discretion. See *Tillett v. Aydlett*, 90 N.C. 551 (1884) (clerk has court's discretion for purposes of decreeing sale of decedent's estate for payment of debts); see also W. Shuford, N.C. Civ. Prac. and Proc. Sec. 6-4 (1975). Furthermore, the defendants were not "taken by surprise." See *Morris v. Dickson*, 14 N.C. App. 122, 187 S.E. 2d 409 (1972). The plaintiffs' action did not abate.

II

Plaintiffs contend that the trial court erroneously set aside the entry of default and judgment by default and improperly extended defendants' time to file an answer. These contentions are discussed separately.

An entry of default by the clerk is appropriate "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead. . . ." Rule 55(a), N.C. Rules Civ. Proc. (1983). The trial judge may set aside an entry of default for "good cause shown." *Id.* Rule 55(d). This determination of good cause is in the sound discretion of the trial judge. *Byrd v. Mortenson*, 308 N.C. 536, 302 S.E. 2d 809 (1983); *Frye v. Wiles*, 33 N.C. App. 581, 235 S.E. 2d 889 (1977). This Court will not disturb the trial court's determination absent a showing that the court abused its discretion by taking actions "manifestly unsupported by reason." *Bailey v. Gooding*, 60 N.C. App. 459, 463, 299 S.E. 2d 267, 271 (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980)), *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 753 (1983).

[2] The plaintiffs contend that the trial court did not exercise its discretion in setting aside the entry of default because it never made a "good cause" determination. That is, the trial court based its decision on the conclusion of law that the entry of default was void because the defendants' motion for extension of time was never heard by a judge. The trial judge concluded as a matter of law, "The Entry of Default is void in that the defendants had filed a Motion for Extension of Time that had not been heard by the Judge." The Order continued, "Based on the foregoing conclusions

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of law, it is ordered: 1. As a matter of law and in the discretion of the Court, the Entry of Default against the Defendants Jennette is void and set aside." The trial court correctly concluded that the default entry was void. Thus, we need not decide whether the court also based its decision on a discretionary good cause determination.

The defendants in the original action were served on two separate dates, a week apart—the Jennettes on 23 November and their attorney, Pritchett, on 30 November 1983. On 28 December 1983, Pritchett, believing that all the defendants were served on the same date, filed what he assumed to be a timely motion with the clerk of the court for an extension of time to file an answer. This motion was granted the same day by the clerk under Rule 6(b), N.C. Rules of Civ. Proc. Upon realizing that the Jennettes had been served more than thirty days before 28 December, the clerk rescinded the extension of time as to the Jennettes. This was proper, because although a clerk may extend the time for pleading "for cause shown . . . if request therefor is made *before* the expiration of the period originally prescribed," only the trial judge may extend the time for pleading, when failure to plead is a result of "excusable neglect," on a motion made *after* the expiration of the prescribed period. Rule 6(b), N.C. Rules Civ. Proc.

Thus, the clerk had no authority to grant the extension as far as the Jennettes were concerned. But, the clerk did not notify the trial judge that there was pending a motion for an extension of time, nor did she notify Pritchett or the Jennettes that there was a mistake. The clerk simply entered the plaintiffs' dismissal of Pritchett and entered default and judgment by default against the Jennettes. In essence, the clerk exercised the trial court's discretion, *ex parte*, to deny the Jennettes' motion for an extension of time, which, although submitted to the clerk of the court, was implicitly addressed to the discretion of the trial court. The Jennettes should have been given the opportunity to show excusable neglect to a judge. Just as the clerk had no authority to grant the motion, she had no authority to deny the motion. The entry of default would have been proper had there been no motion for an extension of time to plead, because the Jennettes' thirty days had expired. See *First Union Nat'l Bank v. Wilson*, 60 N.C. App. 781, 300 S.E. 2d 19 (1983). While that motion was pending, however, the clerk should not have superseded the judge's

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authority by entering default. "[A] default should not be entered, even though technical default is clear, if justice may be served otherwise." *Peebles v. Moore*, 302 N.C. 351, 356, 275 S.E. 2d 833, 836 (1981) (citations omitted); cf. *McDaniel v. Fordham*, 264 N.C. 62, 64, 140 S.E. 2d 736, 738 (1965) ("If the motion [to strike] was timely filed, or if allowed to be filed as a matter of discretion, the defendants were not required to answer until the motion was passed on by the judge." (Citation omitted)). Therefore, the entry of default was void and properly set aside.

[3] The judgment by default also properly was set aside by the trial court. A clerk may enter judgment by default against a defendant only if "he has been defaulted for failure to appear" Once the entry of default was properly set aside, the default judgment was groundless. The trial court set aside the default judgment because the defendants had made an appearance in the action. Once a party has made an appearance, a judgment by default can be made only by the judge upon three days notice. Rule 6(b), N.C. Rules Civ. Proc.; *Roland v. W & L Motor Lines, Inc.*, 32 N.C. App. 288, 231 S.E. 2d 685 (1977); *Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E. 2d 649 (1974). An appearance within the meaning of Rule 6(b) need not be a direct response to the complaint; there may be an appearance whenever a defendant "takes, seeks or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Roland*, 32 N.C. App. at 289, 231 S.E. 2d at 687 (citations omitted). In *Roland*, the defendant, after receiving a summons and complaint, wrote a letter to the plaintiff's attorney referring to the lawsuit and asserting various claims and defenses. The clerk of the court entered default and judgment by default against the defendant. This Court held that the letter constituted an appearance sufficient to bar a default judgment, and because there had been an appearance, the default judgment filed by the clerk was void. *Id.* at 291, 231 S.E. 2d at 688; see *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E. 2d 806 (1975), *disc. rev. denied*, 289 N.C. 619, 223 S.E. 2d 396 (1976).

We conclude that the Jennettes appeared in the action on 28 December 1983, through their attorney, by filing a motion for an extension of time to plead.² The default judgment was void

2. We note that in 1975, N.C. Gen. Stat. Sec. 1-75.7 was amended to exclude from "general appearance" the grant of an extension of time within which to

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because the defendants had made an appearance, never received notice, and the clerk, not the judge, entered the judgment. It is not necessary to decide whether the claim was for a "sum certain" under Rule 55(b)(1).

[4] We also find no error in the trial court's granting defendants additional time to file responsive pleadings. The standard for granting an extension after the original period has expired is one of "excusable neglect." Rule 6(b), N.C. Rules Civ. Proc. This Court will defer to the trial judge, unless it is shown that there has been an abuse of discretion. *See Norris v. West*, 35 N.C. App. 21, 239 S.E. 2d 715 (1978). Although the trial court's order does not set out the basis for a finding of excusable neglect, the judge indicated that the extension was granted in his discretion, and the record, taken as a whole, supports a finding of excusable neglect. On 29 December 1983, the Jennettes filed a new motion for an extension of time. This motion was filed one hour after the clerk had rescinded the previous extension, entered default and entered judgment by default. The Jennettes alleged in their motion: conflicting schedules, previous commitments and the inadvertent tardiness of their attorney who believed that all the defendants had been served on the same day. Implicit in the trial court's Order is the finding of excusable neglect, and we find no abuse of discretion in extending defendants' time to answer. *See Commercial Union Assurance Cos. v. Atwater Motor Co., Inc.*, 35 N.C. App. 397, 241 S.E. 2d 334 (1978) (failure to find facts to support Rule 60(b)(1) excusable neglect not error, unless previously requested by a party; presumption that judge found facts sufficient to support order); *see also Norris* (finding of excusable neglect upheld when defendant waited twenty-seven days to contact insurer, mistakenly believing he had thirty); *Byrd* (finding of excusable neglect upheld when defendant contacted insurer as soon as he learned of suit against him).

answer. This amendment simply allows a party to move for an extension of time without waiving the defenses of lack of personal jurisdiction or service of process. It is not applicable to the meaning of "appearance" in Rule 55(b)(1), except perhaps by way of contrast: since Rule 55 was not similarly amended in 1975, it is still possible to "appear" within Rule 55 by moving for an extension of time. *Cf. Webb v. James*, 46 N.C. App. 551, 556-57, 265 S.E. 2d 642, 646 (1980).

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III

[5] Plaintiffs' final contention is that summary judgment in favor of the defendants was improper because the plaintiffs alleged fraud with particularity and genuine issues of material fact remain for the jury. Plaintiffs, in their Complaint, allege all the elements of fraud, with particularity, except for one essential element: that the defendants inhibited the plaintiffs from inspecting or inquiring about the land. In order to make out a *prima facie* case for the fraudulent sale of land in its natural, undeveloped state, the plaintiffs must allege that they were "fraudulently induced to forbear inquiries" concerning the land:

Representations concerning the value of real property or its condition and the adaptation to particular uses will not support an action in deceit unless the purchaser has been fraudulently induced to forbear inquiries which he would otherwise have made, and if fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration. . . .

"It is generally held that one has no right to rely on representations as to the condition, quality or character of property, or its adaptability to certain uses, where the parties stand on an equal footing and have equal means of knowing the truth. The contrary is true however where the parties have not equal knowledge and he to whom the representation is made has no opportunity to examine the property or by fraud is prevented from making an examination." 12 R.C.L., 384. When the parties deal at arm's length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation, action in deceit will not lie.

Harding v. Southern Loan & Ins. Co., 218 N.C. 129, 134-35, 10 S.E. 2d 599, 601-02 (1940) (citations omitted).

In *Harding*, the plaintiff knew that the defendant-seller was not an expert and made representations only from secondhand knowledge. In the case before us, the plaintiffs allege that they believed the defendant-seller to be an expert speaking from experience and firsthand knowledge. Nevertheless, we hold that the

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plaintiff had no right to rely solely on the representations of the seller of the land in this case. A vendor of land in its natural, undeveloped state cannot fraudulently misrepresent the condition or potential uses of that land, unless the vendor induces the purchaser to forego inquiry or investigation of the land. In this case, the plaintiffs were taken to the tract of land in a boat by the defendant and were given ample opportunity to inspect, or to have independent experts inspect, the land before the purchase. The plaintiffs failed to allege that the defendants had and withheld unique knowledge about the property.

The facts, taken in the light most favorable to the plaintiffs, fail to establish a *prima facie* case for the fraudulent sale of land in its natural state. Summary judgment in favor of defendants was proper in this case.

For the reasons stated above, we

Affirm.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. SADI MORIS PERKEROL

No. 8410SC1042

(Filed 15 October 1985)

1. Searches and Seizures § 13— trafficking in cocaine—airport search—drug courier profile—motion to suppress properly denied

The trial court did not err in a prosecution for trafficking in cocaine by denying defendant's motion to suppress evidence seized from his person and statements made by him during and after an airport investigative stop pursuant to the drug courier profile where the trial court's conclusions, supported by competent evidence, were that a reasonable person would have believed he was free to leave, defendant agreed to accompany the officers to their office voluntarily and in a spirit of cooperation, defendant freely and voluntarily consented to a search of his bag, and defendant voluntarily waived his rights, made statements to officers, and produced a bag of white powder from his pants pocket.

2. Criminal Law § 138— trafficking in cocaine—assistance to prosecutor

The Court of Appeals could not determine the basis of a trial judge's statement while sentencing defendant for trafficking in cocaine that defendant

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had not complied with G.S. 90-95(h)(5) (1981) in assisting the prosecutor where the judge knew that an S.B.I. agent had approached defendant after his arrest to inquire about defendant providing substantial assistance under the statute and that defendant declined, defendant later sought unsuccessfully to suppress evidence seized and statements made, defendant indicated he was willing to provide assistance fifteen months later on the morning of the sentencing hearing but the district attorney's office declined the offer, and the assistance defendant offered included the identity and locations of individuals who met him at the airport to accept delivery of the cocaine he was carrying. This information does not support a ruling as a matter of law that defendant's offer of substantial assistance was not timely made and the matter was remanded for a new sentencing hearing.

APPEAL by defendant from the 26 April 1984 Order, denying his Motion to Suppress, of *Herring, Judge*, and the 9 July 1984 Judgment of *Brannon, Judge*. The Order and Judgment were entered in Superior Court, WAKE County. Heard in the Court of Appeals 4 April 1985.

Attorney General Edmisten, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Purser, Cheshire, Manning & Parker, by Thomas C. Manning, for defendant appellant.

BECTON, Judge.

On 8 July 1984, the defendant, Sadi Moris Perkerol, pleaded guilty to trafficking in cocaine by possession and transportation, reserving his right, pursuant to N.C. Gen. Stat. Sec. 15A-979(b) (1983), to submit for appellate review Judge D. B. Herring, Jr.'s Order denying his motion to suppress evidence seized from his person and his motion to suppress statements made by him. Judge Anthony Brannon accepted the plea, found that defendant had not rendered "substantial assistance" to the prosecutor under N.C. Gen. Stat. Sec. 90-95(h)(5) (1981), and sentenced defendant to prison for twelve years. Considering the scope of appellate review and the record on appeal, we affirm the order denying defendant's motions to suppress. For error committed at the sentencing hearing, however, we remand.

I

[1] This case involves one of the many hundreds of drug courier profile stops at airports in the United States during the past ten

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years. As we noted in *State v. Grimmer*, 54 N.C. App. 494, 494 n. 1, 284 S.E. 2d 144, 146 (1981), *disc. rev. denied and appeal dismissed*, 305 N.C. 304, 290 S.E. 2d 706 (1982):

"Since 1974, the federal Drug Enforcement Administration has assigned agents to certain airports as part of a nationwide program to intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States. Federal agents have developed 'drug courier profiles' describing the characteristics generally associated with narcotics traffickers, and travelers with some of those characteristics are occasionally stopped at these airports for further investigation." 3 W. LaFave, *Search & Seizure; A Treatise on the Fourth Amendment*, Sec. 9.3 (Supp. 1981).

In this case, the trial court found the following facts:

1. On April 13, 1983, Captain J. L. Brown of the Wake County Sheriff's Department and Special Agent Terry Turbeville of the North Carolina State Bureau of Investigation were assigned to work at the Raleigh-Durham Airport as members of a Narcotics Interdiction Unit.

2. As the officers were positioned at the Gregg Security Checkpoint in Terminal B to observe passengers deplane Eastern Airlines flight 594 from Atlanta, Georgia, they observed two white males in the airport lobby who appeared to be watching the officers.

3. The defendant entered the terminal area dressed in casual attire and carrying a shoulder bag which appeared to be almost empty. As he did so, he was met by the two men and hurried out of the airport without exchanging any greeting and without approaching the baggage claim area.

4. As the men exited the airport and walked by Special Agent Turbeville, he addressed the defendant, "May I speak with you a moment?" Special Agent Turbeville identified himself and Captain Brown and asked if they could see the defendant's airline ticket. The defendant then placed his shoulder bag on top of a car and unzipped it. It appeared to Agent Turbeville that the defendant was attempting to conceal the contents of the bag as he produced his airline ticket

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from the bag. The ticket was an Eastern Airlines ticket from flight 594 in the name of S. Peck, with a return to Atlanta the following day. Turbeville then returned the airline ticket and asked to see another form of identification and the defendant produced a North Carolina Driver's License in the name of Sadi Perkerol. Agent Turbeville then returned the driver's license to the defendant and explained to the defendant that he and Captain Brown were Narcotics Officers and that they would like to speak with him a moment. Turbeville indicated that they had an office a short distance away and that they could step into the office to avoid any possible embarrassment. The defendant said, "Okay." Turbeville asked the defendant if he would like to get his bag and the defendant brought the bag with him to the office.

5. After the defendant, Captain Brown, and Agent Turbeville arrived at the office, Turbeville again explained that the officers were Narcotics Officers and were attempting to stem the flow of narcotics into the Raleigh-Durham area. He then asked the defendant for consent to search his person and his bag. At that point, Captain Brown, who was standing nearest the bag, asked the defendant, "May I have a look in your bag?" and the defendant replied, "Yes, go ahead." Captain Brown then unzipped the bag and found several plastic bags containing white powder. A preliminary test on the white powder conducted by the officers showed it to be cocaine.

6. The defendant was then placed under arrest and advised of his *Miranda* rights by Captain Brown, who read the rights from a standard *Miranda* rights card, and the defendant indicated that he understood those rights.

7. At no time did either Captain Brown or Agent Turbeville place their hands on the defendant. Neither officer displayed any weapons. The defendant was not handcuffed until after he was placed under arrest. Neither officer was in uniform. The officers made no promises to the defendant, nor did they threaten him in any way. The officers addressed the defendant in a conversational tone of voice. The officers did not touch the defendant's bag until the defendant agreed to the bag's being searched. The defendant never indicated to the officers that he did not wish to cooperate with them.

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Defendant, of course, takes exception to most of the findings of fact and finds comfort in the United States Supreme Court's failure in three¹ "drug courier profile cases" to resolve definitively the seizure-nonseizure issues presented. The first case, *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S.Ct. 1870, *rehearing denied*, 448 U.S. 908, 65 L.Ed. 2d 1138, 100 S.Ct. 3051 (1980), involved facts strikingly similar to those of the case at bar. Again, as noted in *Grimmett*, although the *Mendenhall* Court was unable to produce a majority opinion, Justice Stewart, joined by Justice Rehnquist, found no seizure because the encounter between Mendenhall and the DEA agents was consensual. In a concurring opinion, Justice Powell, joined by the Chief Justice and Justice Blackmun, declined to decide whether the stop constituted a seizure, although they did "not necessarily disagree" with Justice Stewart's view. In the second case, *Reid v. Georgia*, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980), the Supreme Court, in a *per curiam* opinion, concluded that defendant's conformance to four characteristics of a drug courier profile was insufficient to establish a reasonable suspicion that they were engaged in criminal activity, but the Court refused to address the seizure issue because it had not been litigated at the trial level. In the third case, *Florida v. Royer*, 460 U.S. 491, 75 L.Ed. 2d 229, 103 S.Ct. 1319 (1983), a plurality stated that no seizure occurred when DEA agents initially approached Royer and questioned him. However, a seizure did occur when the agents identified themselves as narcotics agents, told Royer he was suspected of trans-

1. In what could be considered a fourth drug courier profile case—*Florida v. Rodriguez*, 469 U.S. ---, ---, 83 L.Ed. 2d 165, 171, 105 S.Ct. 308, 311 (1984), an airport drug stop case in which the majority, in a *per curiam* opinion, never mentioned the words "drug courier profile"—the Supreme Court "[a]ssum[ed], without deciding, . . . there was a 'seizure' . . . [but held] that any such seizure was justified by 'articulable suspicion'." Indeed, after noting Miami's reputation as a "source city," listing the arresting officers' training and experience in narcotics surveillance, and referring to, but not detailing, the defendants' unusual behavior, the *Rodriguez* Court said:

"Before the officers even spoke to the three confederates, one by one they had sighted the plain clothes officers and had spoken furtively to one another. One was twice overheard urging the others to 'get out of here.' Respondent's strange movements in his attempt to evade the officers aroused further justifiable suspicion, and so did the contradictory statements concerning the identities of Blanco and respondent."

Id. at ---, 83 L.Ed. 2d at 171, 105 S.Ct. at ---.

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porting narcotics and asked him to accompany them to the police room while they retained his ticket and driver's license without indicating that he was free to go.

The Supreme Court's foray into the drug courier profile thicket has been the subject of considerable commentary. See J. Choper, Y. Kamisar & L. Tribe, *The Supreme Court: Trends and Developments 1979-1980*, at 137-39 (1981); Constantino, Cannavo & Goldstein, *Drug Courier Profiles and Airport Stops: Is the Sky the Limit?*, 3 W. New Eng. L. Rev. 175 (1980); Greenberg, *Drug Courier Profiles*, Mendenhall and Reid: *Analyzing Police Intrusion on Less Than Probable Cause*, 19 Am. Crim. L. Rev. 49 (1981); Greene & Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 S. Tex. L.J. 261 (1982); Note, *Drug Courier Profile Stops and the Fourth Amendment: Is the Supreme Court's Case of Confusion In Its Terminal Stage?*, 15 Suffolk U.L. Rev. 217 (1981); Comment, *Reformulating Seizures—Airport Drug Stops and the Fourth Amendment*, 69 Calif. L. Rev. 1486 (1981); Comment, *Drug Trafficking At Airports—The Judicial Response*, 36 U. Miami L. Rev. 91 (1981); Comment, Mendenhall and Reid: *The Drug Courier Profile and Investigative Stops*, 42 U. Pitt. L. Rev. 835 (1981); Comment, *Criminal Profiles After United States v. Mendenhall: How Well-Founded a Suspicion?*, 1981 Utah L. Rev. 557; Case Comment, *Fourth Amendment—Airport Searches and Seizures: Where Will the Court Land?*, 71 J. Crim. Law & Criminology 499 (1980); Case Comment, *Search and Seizure—Airport Drug Seizures: How the Federal Courts Strike the Fourth Amendment Balance*, 58 Notre Dame L. Rev. 668 (1983); Case Comment, *Criminal Law: Drug Courier Profiles, United States v. Mendenhall*, 5 Nova L.J. 141 (1980).

Many of the commentators have been critical of the Supreme Court's analysis in drug courier cases. It is not surprising, then, that the approach taken most often by courts that have wrestled with the problem is based on *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968) which created a limited exception to the general rule that seizures of a person require probable cause. That approach, adopted by our Supreme Court in *State v. Thompson*, 296 N.C. 703, 706, 252 S.E. 2d 776, 779 (1979), "requires only that the officer have a 'reasonable' or 'founded' suspicion as justification for a limited investigative seizure." And, although *Thompson* is not a drug courier profile case, this Court, in the

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drug courier profile context, following both *Terry* and its progeny and our Supreme Court's statement in *Thompson*, adopted a three-tiered standard by which to balance the need to investigate possible criminal activity against the intrusion of individual freedom in police-citizen encounters:

1. Communications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment;
2. Brief seizures must be supported by reasonable suspicion; and
3. Full-scale arrests must be supported by probable cause.

State v. Harrell, 67 N.C. App. 57, 312 S.E. 2d 230 (1984); *State v. Sugg*, 61 N.C. App. 106, 300 S.E. 2d 248, *disc. rev. denied*, 308 N.C. 390, 302 S.E. 2d 257 (1983); *State v. Grimmett*; see *United States v. Berry*, 670 F. 2d 583 (5th Cir. 1982).

With the foregoing as a backdrop, and especially considering this Court's pronouncements in *Harrell*, *Sugg*, and *Grimmett* and our scope of review, we reject defendant's alternative contentions (1) that the initial encounter constituted a seizure that was unsupported by specific and articulable facts or reasonable suspicion that defendant was engaged in criminal activity, and (2) that defendant was seized when the officers requested that he accompany them to the office after they had discovered additional facts from their initial questioning. The following conclusions of law by the trial court, which we find to be based on competent evidence, are binding on us and foreclose relief to defendant.

2. The conduct of Special Agent Turbeville and Captain Brown in approaching the defendant and requesting to see his airline ticket and driver's license constituted a Constitutionally permissible investigative stop. The totality of the circumstances and all of the credible evidence point to the conclusion that the defendant was not seized within the meaning of the Fourth Amendment and that a reasonable person would have believed he was free to leave.

3. The defendant agreed to accompany the officers to their office voluntarily and in a spirit of apparent cooperation. The officers' request that the defendant accompany

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them to the office did not transform the initial Constitutional-permissible encounter into a seizure.

4. The defendant freely and voluntarily gave the officers his consent to search the bag without the officers' having made any threats, either express or implied.

5. The defendant was properly advised of his *Miranda* rights by the officers both at the airport office and at the Wake County Sheriff's Department. He freely, voluntarily, and knowingly waived those rights and made statements to the law enforcement officers without any duress, coercion, or inducement by the officers.

6. After having been arrested and before being taken to the jail, the defendant voluntarily produced the bag of white powder from his pants pocket.

These conclusions of law likewise prompt us to reject defendant's argument that he did not consent to the search of his bag. See *State v. Grimmer*; cf. *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983) (findings supported the trial court's conclusion that defendant voluntarily, willingly and understandingly consented to a search of his bedroom, notwithstanding defendant presented evidence that he was 17 years old at the time of the search, that he had an I.Q. of only 50 to 65, that he suffered from a schizophreniform disorder, that he was more susceptible to fear and intimidation than an average person, that ten police officers were present when he was arrested, and that officers told him that if he refused to sign the form, a warrant would be obtained and "Either way, we are going to search the apartment").

II

[2] N.C. Gen. Stat. Sec. 90-95(h)(5) (1981) provides, in pertinent part, that:

[T]he sentencing judge *may* reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, coconspirators, or principals if the sentencing

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judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance. (Emphasis added.)

On Perkerol's Judgment and Commitment form, the sentencing judge stated: "The defendant has not complied with the section of the Statute dealing with assistance to the prosecutor." Defendant asserts that the sentencing judge erroneously concluded "as a matter of law that the defendant's offer of substantial assistance pursuant to N.C.G.S. Sec. 90-95(h)(5), made at the time he entered his plea of guilty, was not timely made." On the other hand, the State asserts that the sentencing judge did not focus on the timeliness of the information defendant sought to provide but rather, found "that the defendant had not rendered substantial assistance" The differing interpretations of the sentencing judge's statement prompts a remand for resentencing because we cannot determine upon what basis the sentencing judge acted.

Before sentencing defendant, the judge knew (1) that following defendant's arrest, Special Agent Turbeville approached defense counsel to inquire about the defendant's providing substantial assistance under the statute and that defendant initially declined; (2) that defendant later sought, unsuccessfully, to suppress evidence seized and statements made; (3) that some fifteen months later, on the morning of the sentencing hearing, defendant indicated he was willing to provide assistance, but the district attorney's office declined the defendant's offer; and (4) that the assistance defendant offered included the identity and locations of the individuals who met him at the airport on 13 April 1983 to accept the delivery of the cocaine he was carrying. In our view, this information does not support a ruling, as a matter of law, that defendant's offer of substantial assistance was not timely made. First, the statutory language "has rendered such substantial assistance" commonsensically sets no time limit on when such assistance must be rendered. After all, defendants charged with drug offenses often seek to suppress evidence and avoid convictions before implicating themselves and others.² Sec-

2. Compare the Florida statute, which provides that "[t]he State attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted . . . and who provides substantial assistance" Fla. Stat. Annot. Sec. 893.135 (1985 Supp.). A Florida District Court of Appeals interpreted this statute as offering "its inducement to the defendant at a time when he has already

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ond, in enacting G.S. § 90-95, our legislature recognized that a system of mandatory prison terms coupled with harsh fines is not enough to deter drug traffickers. In *State v. Baldwin*, 66 N.C. App. 156, 159, 310 S.E. 2d 780, 782, *aff'd*, 310 N.C. 623, 313 S.E. 2d 159 (1984), we said:

Trafficking relies on complex, interwoven networks. A principal in one network may be an accomplice in another. To effectively combat trafficking, police authorities need information on, and access to, the myriad of drug-dealing activities in the various networks. Built into the trafficking statutes is a *bargaining tool*, G.S. Sec. 90-95(h)(5), a provision exchanging potential leniency for assistance from those who have easy access to drug networks.

Realizing that G.S. § 90-95(h)(5) does not make the State's acceptance of a defendant's offer a prerequisite to finding substantial assistance and that the statute includes the specific language, "when such person has, to the best of his knowledge, provided substantial assistance," we remand so the sentencing judge can determine if defendant provided "substantial assistance" in accordance with the statute. We recognize, of course, that the statute is permissive, not mandatory, and that defendant has no right to a lesser sentence even if he does provide what he believes to be substantial assistance.

For the foregoing reasons, the order denying defendant's motion to suppress is affirmed; the judgment imposing a twelve-year sentence is vacated, and the matter is remanded for a new sentencing hearing.

Affirmed in part and remanded.

Judges WEBB and PARKER concur.

been adjudicated guilty, either on a plea of guilty or on a verdict" *Stehling v. State*, 391 So. 2d 287, 288 (Fla. App. 1981). Moreover, in *State v. Willis*, 61 N.C. App. 23, 41, 300 S.E. 2d 420, 430-31, *modified and aff'd*, 309 N.C. 451, 306 S.E. 2d 779 (1983), this Court, quoting another Florida case, *State v. Benitez*, 395 So. 2d 514, 518-19 (Fla. 1981), likened what is now G.S. Sec. 90-95(h)(5) to a "post-conviction form of plea bargaining."

In re Estate of Edwards

IN THE MATTER OF THE ESTATE OF VIRGINIA DUNCAN EDWARDS,
DECEASED

No. 8514SC177

(Filed 15 October 1985)

Descent and Distribution § 5; Wills § 61— natural children of deceased—adoption during second marriage—lineal descendants of second marriage—effect on second spouse's dissent

Natural children of a deceased spouse who were born during a first marriage but adopted by deceased's second spouse during the second marriage are lineal descendants by the second marriage within the meaning of G.S. 30-3(b) so that the dissenting second spouse is entitled to a greater share of deceased's estate under that statute.

Judge JOHNSON dissenting.

APPEAL by respondents from *Farmer, Judge*. Judgment entered 5 November 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 25 September 1985.

This case involves a surviving second spouse's dissent from a will. From judgment in favor of petitioner dissenting spouse, respondent executors appeal.

W. Y. Manson and Samuel Roberti for petitioner-appellee.

Nye & Mitchell, by R. Roy Mitchell, Jr., and Edmund D. Milam, Jr., for respondent-appellants.

EAGLES, Judge.

This case presents a single question of first impression: Are natural children of one spouse born during a previous marriage, if adopted by a second spouse with consent of their surviving natural parent, considered lineal descendants by the second marriage for purposes of G.S. 30-3(b) which determines a dissenting spouse's share?

I

Virginia Duncan Edwards, deceased, had five children by her first marriage, which ended with the death of her first husband. She married Daniel K. Edwards (petitioner) in 1968. In 1970, when three of the five children had reached their majority, petitioner,

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with the consent of the deceased pursuant to G.S. 48-7(d), adopted the two minor children. Final orders of adoption were duly entered in Superior Court, Durham County. Deceased died in 1983. Her probate estate totalled approximately \$1.6 million; her will made no provision for petitioner. In apt time, petitioner dissented. Controversy arose over whether petitioner was entitled to one-third of the estate pursuant to G.S. 30-3(a) or only one-sixth pursuant to G.S. 30-3(b). From orders of the Clerk of Superior Court and the Superior Court in favor of petitioner, respondent executors appeal.

II

A surviving spouse enjoys a general statutory right to dissent from the deceased spouse's will. G.S. 30-1; *Vinson v. Chappell*, 275 N.C. 234, 166 S.E. 2d 686 (1969). A dissenting spouse takes the same share he or she would have taken if their deceased spouse had died intestate. G.S. 30-3(a). For surviving *second* spouses, this right is modified by G.S. 30-3(b):

Whenever the surviving spouse is a second or successive spouse, he or she shall take only one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage.

While the legislative purpose of this provision is not entirely clear, *Vinson v. Chappell*, *supra*, it was apparently "passed to protect a testator's children by a former marriage against a 'fortune-hunting' second or successive spouse." *Phillips v. Phillips*, 296 N.C. 590, 606, 252 S.E. 2d 761, 771 (1979).

Petitioner contends that by virtue of the adoption of the two minors by himself and his deceased spouse (their natural mother), they became the lineal descendants of both parents as of the time of adoption. Respondents contend that petitioner's adoption, to which deceased merely consented, could not affect her relationship with her own children, who remained her children by her first marriage. By petitioner's construction he is entitled to a full one-third share, G.S. 29-14(a)(2), 29-14(b)(2), while under respondents' construction that share would be only one-sixth.

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This appears to be a question of first impression generally. Our research discloses only two other states with statutes similar to G.S. 30-3(b), *see* Ind. Code Ann. Section 29-1-3-1 (Burns Supp. 1985); Wyo. Stat. Section 2-5-101 (1977) and there are few reported decisions. We have found no reported decision addressing this particular problem.

III

We turn first to the language of G.S. 30-3(b) itself, noting preliminarily that participation in the estate of a deceased person is by legislative grace, since only the State enjoys any natural or inherent right to succession. *Vinson v. Chappell, supra; In re Morris Estate*, 138 N.C. 259, 50 S.E. 682 (1905). Accordingly, there is no presumption in favor of the will or against the right of a spouse to dissent. The statute applies to reduce petitioner's share (1) if there are lineal descendants of deceased by the first marriage (here there are clearly at least three) and (2) there are "no lineal descendants surviving [deceased] by the second . . . marriage." The term "lineal descendants" is not defined in Chapter 30 of the General Statutes, but is defined at G.S. 29-2(4) as "all children of such person." This would include even illegitimate children of a deceased female, G.S. 29-19(a), and clearly includes adopted children. G.S. 29-17. The phrase "lineal descendants" generally applies not to distinguish between children of various marriages or out of wedlock but to distinguish children from other collateral descendants, *e.g.* nieces and nephews. *See* 26A C.J.S. Descent & Distribution, Section 27 (1956). The two minors were their deceased mother's lineal descendants. The real question is whether they were lineal descendants of their mother and adoptive father "by the second marriage."

IV

In deciding this question we must consider the effect of the adoption. Like the right to dissent, adoption did not exist at common law and is entirely statutory in nature. *See In re Daught-ridge*, 25 N.C. App. 141, 212 S.E. 2d 519 (1975); 2 Am. Jur. 2d, Adoption, Section 2 (1962). Petitioner here was the sole petitioner in the 1970 adoption proceedings; his deceased spouse (the children's natural mother) consented to but did not join in the petition. "When a stepparent [petitioner] petitions to adopt a step-child, consent to the adoption must be given by the spouse of the

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petitioner [deceased], and this adoption shall not affect the relationship of parent and child between such spouse and the child." G.S. 48-7(d). This language, on its face, would seem to indicate that the relationship of the children to their mother, as her children by the first marriage, did not change.

We must also consider G.S. 48-23, however. When originally adopted, at the same time as G.S. 48-7(d), it provided:

Effect of final order. The final order forthwith shall establish the relationship of parent and child between the petitioners and the child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property from the adoptive parents in accordance with the statutes of descent and distribution.

1949 N.C. Sess. Laws c. 300, s. 1. This section was considered in *Bradford v. Johnson*, 237 N.C. 572, 75 S.E. 2d 632 (1953). Applying principles of will construction, the court held that regardless of the parent-child relationship established by the statute, the adoptive child did not become "a lawfully begotten heir of the bodies" of the adoptive parents. *Id.* at 581, 75 S.E. 2d at 638.

Shortly thereafter, the General Assembly adopted the current provisions of G.S. 48-23(1):

The final order forthwith shall establish the relationship of parent and child between the petitioners and child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes of descent and distribution. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth.

1955 N.C. Sess. Laws c. 813, s. 5, *codified at* G.S. 48-23(1). (The 1963 amendment, 1963 N.C. Sess. Laws c. 967, s. 1, did not change these provisions except to replace the words "of descent and distribution" with the term "relating to intestate succession.") With *Bradford* recently decided, the General Assembly's enact-

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ment appears to have intended (1) to establish unequivocally the legal equality of adopted children with their natural siblings and (2) to provide a single, easily applied test to determine their legal rights. As summarized in a comment:

Here is a simple and clear rule which eliminates all doubt as to the standing and rights of an adopted child. For all legal purposes he is in the same position as if he had been born to his adoptive parents at the time of the adoption. There is no need for any learned and complicated interpretations. Whatever the problem is concerning an adopted child, his standing and his legal rights can be measured by this clear test: "What would his standing and his rights be if he had been born to his adoptive parents at the time of the adoption?"

A Survey of Statutory Changes in North Carolina in 1955, 33 N.C. L. Rev. 513, 522 (1955), *quoted with approval Crumpton v. Mitchell*, 303 N.C. 657, 663, 281 S.E. 2d 1, 5 (1981) (adoption affects "complete substitution" of new family for old). The 1963 amendment, which added that the statute would so affect *every* final order of adoption, reinforces this reading of the amended statute. 1963 N.C. Sess. Laws c. 967, s. 1.

We interpret the language of G.S. 48-7(d), that adoption by a stepparent does not affect the parent-child relation with the natural parent, as a measure to protect that parent-child relationship from the otherwise sweeping effects of G.S. 48-23(1), which otherwise might be construed to terminate the natural parent-child relationship. We note that *Bradford v. Johnson*, *supra*, decided before the enactment of the present G.S. 48-23(1), stands for the proposition that there is some difference between parent and child and deceased and heir.

Applying G.S. 48-23(1) to the facts of this case, we hold that the two children adopted must be treated *legally* as having been born at the time of the order of adoption in 1970. At that time their mother, the deceased spouse here, was not unmarried but was married to petitioner. Accordingly, the children were as a matter of law born of the second marriage, and are "lineal descendants by the second marriage" within the intended meaning of G.S. 30-3(b).

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V

This result is consistent with legislative policy concerning both adoptions and their effect and the rights and obligations of surviving spouses. We are aware that petitioner will be now able to obtain a greater share of the estate, though he was not named in the will. However, we recall that the deceased's power to effectuate a testamentary disposition of her property comes from the statutes and the same statutes establish the surviving spouse's right to claim a share of the estate regardless of testamentary intent. Had deceased wished to avoid this result, she could have withheld her consent to the adoption. Her children would have still been fully legitimate, and apparently could have been cared for adequately from her resources. By adopting the children, petitioner assumed a duty to support them. The adopted children acquired *gratis* whatever rights and property might arise directly upon their adoptive father's death or might devolve to them from him through their mother. We note in passing that at the time of the adoption the adopted children were of tender years, 4 and 6 respectively, and stood to benefit in intangible ways from the guidance of a caring father who would have retained the responsibility to rear them if their mother had died during their minority. While there is substantial wealth involved here, the adoptive father's obligation to bring up young children and to be responsible for them during their minority is a major undertaking in any family situation without regard for wealth or station.

VI

Respondents argue that our interpretation of the statutes incongruously results in a situation where the natural parent adopts her own legitimate children by merely consenting to their adoption by the stepparent. For the limited purposes of determining a dissenting spouse's share pursuant to G.S. 30-3(b), this may be true. Nevertheless, we believe that the result we reach correctly reflects the legislative intent. As Justice (later Chief Justice) Bobbitt observed in 1969 in *Vinson v. Chappell*, *supra*, the statutes in question contain the "seeds of inequities" and could be clarified or modified, but that is a matter for the legislature. The legislature has not acted with respect to G.S. 30-3 since that decision. While we have found no North Carolina cases on point, we note that courts of other states have allowed natural

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parents to adopt their own natural children even when the legal relationship was not affected. See *Petition of Curran*, 314 Mass. 91, 49 N.E. 2d 432 (1943) (single mother adopted own child); *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E. 2d 720 (1967) (mother allowed to adopt own child with stepfather); but see *In re Graham*, 63 Ohio Misc. 22, 409 N.E. 2d 1067 (C.P. 1980) (divorced mother could not adopt own children since that would terminate father's duty owed to state to provide support). As we pointed out, the natural parent who wishes to avoid the result of this case can do so merely by failing to consent to the adoption.

VII

Respondents filed a motion in this court on the day of argument seeking to amend an answer to a request for admissions originally filed in March 1984. Since we do not rely on the matter allegedly admitted in reaching our decision, the motion is irrelevant and is therefore denied.

VIII

Based on the foregoing discussion, we conclude that the Superior Court correctly applied the law to the facts before it. Its order affirming the clerk's order is therefore

Affirmed.

Judge COZORT concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I agree with respondent-appellants' argument that the focus of G.S. 30-3(b) is on the testatrix, not on the dissenting spouse. The testatrix was not a party to her dissenting spouse's adoption of two of her children; rather, she merely consented to it. While the adoption changed the dissenting spouse's status vis-a-vis the adopted children and theirs vis-a-vis him, it did not change the testatrix' status vis-a-vis the children or theirs vis-a-vis her. The adoption by the second spouse notwithstanding, both in fact and in law the adopted children remain lineal descendants surviving *the testatrix* by her first marriage, not by her second.

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I therefore respectfully dissent. My vote is to reverse the judgment of the Superior Court which confirmed and adopted the judgment of the Clerk, and to remand to the Superior Court for further remand to the Clerk with instructions to enter a judgment decreeing that the dissenting spouse shall take only one-half of his statutory intestate share.

BARBARA EVON GEBB v. DAVID MARTIN GEBB

No. 8429DC1275

(Filed 15 October 1985)

1. Divorce and Alimony § 17.3— alimony—findings insufficient

The findings made by the trial judge were insufficient to indicate that he considered all of the factors enumerated by G.S. 50-16.5(a) and the Court of Appeals was unable to determine whether the award was necessary, fair, and within the defendant's ability to pay where there were no findings as to the total value of the estates of the parties, no findings as to plaintiff's present earning capacity, no findings as to the reasonable living expenses of either of the parties, and no findings as to the accustomed standard of living of the parties. G.S. 1A-1, Rule 52.

2. Divorce and Alimony § 24.9— child support—findings insufficient

The findings of fact were not sufficient to support an order for child support and an order that defendant make certain repairs to a house previously awarded to plaintiff and the minor children where the trial court failed to make findings as to the children's needs, expenses, or accustomed standard of living, and did not make findings concerning whether the repairs were reasonably necessary for the welfare and support of the children. G.S. 50-13.4(c).

3. Divorce and Alimony § 27— attorney's fees—appeal premature

Appellate review of an order regarding attorney's fees in an action for alimony, child support and custody was premature where the court found that plaintiff was without funds to pay her counsel fees and concluded that defendant was liable for their payment but declined to award counsel fees at the time of the order. Whether an award of attorney's fees is appropriate will depend upon the trial court's findings at the time the award is made.

4. Divorce and Alimony § 30— division of marital property—not properly before the court

The trial court had no authority in an action for alimony, custody, and child support to order a division of marital property by the transfer of personal property, the payment of funds formerly held in a joint account, or the payment of proceeds from the sale of jointly owned real estate where the

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pleadings in the case disclosed no request by either party for division of property and the order did not reflect that the payments required thereby were in satisfaction of defendant's obligations to pay alimony and child support. G.S. 50-20, G.S. 50-21.

APPEAL by defendant from *Guice, Judge*. Judgment entered 25 May 1984 in District Court, TRANSYLVANIA County. Heard in the Court of Appeals 20 August 1985.

Plaintiff brought this action for alimony, child custody and support, and attorney fees on 26 August 1980, alleging indignities by defendant. Defendant answered, denying the plaintiff's allegations and alleging indignities by her. Defendant requested that plaintiff not be awarded alimony, and sought a divorce from bed and board and custody of their four minor children. By order dated 19 February 1981, plaintiff was awarded temporary custody of the children and possession of the home; defendant was ordered to pay child support in the amount of \$800.00 per month and temporary alimony in the amount of \$200.00 per month. A subsequent order, dated 11 August 1983, continued custody of the children in plaintiff.

The issues relating to indignities were tried before a jury on 19 January 1982. The jury returned a verdict finding that both plaintiff and defendant had offered indignities to the other. Over the next several months, additional motions were filed and hearings conducted, none of which are pertinent to the issues raised on appeal. On 10 August 1983, a hearing on the issues of alimony and child support was conducted. Thereafter, by order dated 4 January 1984, the trial court ruled that plaintiff was entitled to reduced alimony and ordered defendant to continue payments of temporary alimony and child support, according to the earlier temporary order, and provided further that the case be calendared again at the expiration of 90 days for determination of the amount of permanent alimony. On 9 May 1984, the court heard additional evidence and on 25 May 1984 entered an order resolving "all matters of issue before the Court which included alimony, child support, attorney fees and division of the marital property. . . ." The court ordered defendant to pay plaintiff alimony and child support, provide her with an automobile, provide insurance for plaintiff and the children, deliver to plaintiff certain items of personal property, pay plaintiff money that defendant had taken from their joint bank account, make extensive repairs to the

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house, pay plaintiff one-half the surplus from a sale of eleven acres of real property and pay plaintiff's counsel fees. Defendant appeals.

Potts & Chitwood by Jack H. Potts for plaintiff appellee.

Long, Howell, Parker & Payne, P.A. by Robert B. Long, Jr. and Mary E. Arrowood for defendant appellant.

MARTIN, Judge.

[1] The principal issue before us on this appeal is whether the trial court made sufficient findings of fact to support the awards for alimony and child support. We conclude that it did not. We also conclude that the trial court adjudicated matters not properly before it in this action. Accordingly, we must vacate the order appealed from and remand the case for further proceedings.

A dependent spouse is entitled to an award for alimony when "[t]he supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome." G.S. 50-16.2(7). The jury found that plaintiff suffered indignities offered by defendant, entitling her to alimony under G.S. 50-16.2. The jury also found that plaintiff offered indignities to defendant, which would be grounds under G.S. 50-16.5(b) for disallowing or reducing plaintiff's alimony. The amount of reduced alimony to be awarded lies in the sound discretion of the trial judge. *Self v. Self*, 37 N.C. App. 199, 245 S.E. 2d 541, cert. denied, 295 N.C. 648, 248 S.E. 2d 253 (1978).

The factors which must be considered in determining an award for alimony are set forth in G.S. 50-16.5(a): "[a]limony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." In determining the amount of alimony to be awarded the trial judge must comply with G.S. 1A-1, Rule 52, i.e., find facts specially, state separately the conclusions of law resulting from the facts so found, and direct entry of appropriate judgment. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). All the evidentiary facts need not be recited, but Rule 52 requires specific findings of ultimate facts established by the evidence which determine the issues involved and are essential to support

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the conclusions of law. *Id.* The amount of alimony to be awarded is a reasonable subsistence, which must be determined by the trial judge from the evidence before him. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). G.S. 50-16.5(a) requires a conclusion of law that "circumstances render necessary" a certain amount of alimony, that the supporting spouse is able to pay the alimony, and that the amount is fair and just to all parties. *Quick, supra.* These conclusions must, of course, be based on specific findings of fact in accordance with Rule 52.

In the instant case the findings of fact which relate to the factors listed in G.S. 50-16.5(a) were:

3. That during the major portion of the marriage the Plaintiff worked and contributed her income for the maintenance and support of the parties and children and to further the education of the defendant with the income reported by the defendant for tax purposes as follows:

Year 1976	\$17,380.80
Year 1977	45,287.35
Year 1978	53,014.60
Year 1979	55,089.06
Year 1980	50,250.00
Year 1981	47,602.00
Year 1982	48,500.00
Year 1983 thru July 31	27,365.00

That it would appear from the foregoing that there was a substantial increase of the defendant's income each year until the separation of the parties, and thereafter there was a decrease each year except that the defendant made a little more in 1982 than he did in 1981.

. . . .

6. That the plaintiff has been accepted to the Pennsylvania School of Optometry, beginning in August 1984, and has need of \$10,400.00 per year tuition requirements plus books, equipment, and additional living expenses for the next four (4) years.

. . . .

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11. In an action in the Superior Court of Transylvania County, summary judgment was granted to the plaintiff declaring her to be an equitable owner of one-half interest in the property [150 acre tract], which case was upheld by the North Carolina Court of Appeals.

. . . .

15. That from the joint account of the parties prior to the separation, the defendant withdrew \$20,000.00 and placed it in an account in Asheville on behalf of himself and his mother, and that he immediately prior to the separation, withdrew \$17,000.00 from which he paid off his office debts and purchased a tractor, which he thereafter sold for \$5,000.00 to his mother.

16. That the defendant received payment of some \$600.00 for timber cut from said property, and that there were forty (40) large truckloads in addition thereto for which the defendant received remuneration in an amount unknown to the Court.

. . . .

20. That the house in which the plaintiff and minor children have been residing is in need of certain repairs, and that the same are the responsibility of the defendant. That no repair has been made to the house in over two years, and there is severe structural damage to two bedroom walls, two doors, six door latches, and the foundation of the house. In addition, the dishwasher, washer and dryer, and refrigerator are ten to twelve years old and are not functioning reliably. The two large burners on the stove need repair, and there are electrical and plumbing needs.

. . . .

29. That the defendant's income is in all respects in excess of any amount that the plaintiff could reasonably expect to earn at this time; that because of prior expenditures by the plaintiff of her income and her efforts while the defendant was receiving his education and thereafter, the plaintiff should now be awarded such sums as might be necessary for a limited time in order that she might now place herself in

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the same position to reasonably create sufficient income to provide herself with the approximate standard of living enjoyed by the defendant.

. . . .

31. That the income of the defendant would indicate his ability to earn sufficient funds to reasonably pay the amounts hereafter set forth.

Based on these findings, the court ordered defendant to pay plaintiff the sum of \$10,500.00 per year for four years as "reduced alimony," and to be responsible for payment of all of her hospital, dental, eye and medical expenses, whether by insurance or otherwise, for four years.

There were no findings of fact as to the total value of the estates of the parties, which is the first factor listed in G.S. 50-16.5(a). The trial judge merely found that plaintiff had been determined a one-half equitable owner of the 150 acre property. There was no finding of fact as to the value of the property, although there was evidence that eleven of the 150 acres had been sold for \$3,400 per acre and, on the remaining 139 acres there was a large house, valued at approximately \$70,000, a swimming pool, and a trailer. The findings relating to plaintiff's earning capacity were that she had previously been employed as a teacher earning \$10,350.00 in 1976-77, and that she planned to attend optometry school. There was no finding as to plaintiff's present earning capacity, even though the evidence disclosed that she had both an undergraduate and master's degree, was certified in school administration but had not applied for employment since 1981. Nor were there any findings relating to the reasonable living expenses of either of the parties, although there was evidence before the court concerning the expenses of each of the parties, both before and after separation. Although the court mentioned that the award was necessary to enable plaintiff to place herself in a position to provide for herself a standard of living comparable to that of defendant, the court made no finding of fact as to the accustomed standard of living of the parties, a factor critical to determining an appropriate award of alimony.

Since the findings made by the trial judge are insufficiently complete to indicate that he considered all of the factors enumer-

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ated by G.S. 50-16.5(a) and additional factors required by our case law in making an award of alimony, we are unable to determine whether the award is supported by competent evidence. Thus, we are unable to say whether the award was necessary, fair, and within the defendant's ability to pay, or whether it was so excessive or punitive as to amount to an abuse of discretion. Accordingly, the order awarding alimony must be vacated and this case remanded in order that adequate findings of fact may be made and an appropriate award of alimony may be based thereon.

[2] Defendant also assigns as error the inadequacy of the findings of fact to support the court's order for child support. Payments ordered for support of a minor child "shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties" G.S. 50-13.4(c). The requirements for findings of fact applicable to orders for alimony are also applicable to the determination of reasonable and adequate child support. *Quick, supra*. The trial judge failed to make findings of fact as to the children's needs, expenses or their accustomed standard of living to support the award of \$1,200 per month, and such failure requires that we vacate and remand that portion of the order as well.

Possession of the home had been previously awarded to plaintiff and the minor children. In its order, the trial court required defendant to make certain repairs to the house within 30 days. However, no finding was made concerning whether or not these repairs were reasonably necessary for the welfare and support of the children and therefore properly an obligation of the defendant as a part of his responsibility for their support. There was some evidence, and the court noted, that plaintiff and the children would move to Pennsylvania in order that she might attend school, and thus it is arguable that the repairs would have no reasonable relationship to the welfare of the children. In the absence of a finding, based on competent evidence, that the repairs were necessary for the support and maintenance of the children, the trial court was without authority to order defendant to make them.

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[3] The trial court also found that plaintiff was without funds to pay her counsel fees and concluded that defendant is liable for their payment. The court, however, declined to award counsel fees at the time of the order, and held the matter open for further hearing. The purpose of awarding such fees is to allow the dependent spouse to meet the supporting spouse, as litigants, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). Whether an award of attorney's fees is or is not appropriate in this case will depend upon the trial court's findings at the time the award is made. Since the order regarding attorney's fees is not a final award, appellate review is premature. We decline to rule on this assignment of error until it is properly before us.

[4] Appellant also contends that the court adjudicated matters not properly before it. We agree. The court prefaced its order with the statement that the order was intended to resolve all issues before it including division of marital property. The order provided:

8. That as a further settlement of the property rights of the parties hereto, the defendant shall deliver to the plaintiff the following items of personal property taken by him from the home occupied by the plaintiff:

- a) The one-half silver service taken by defendant.
- b) One crystal dish.
- c) The gun and sight, formerly the property of the father of the plaintiff.
- d) Cherry nightstand and dresser which was a portion of the bedroom suite of daughter, Anita.
- e) All picture albums compiled by the plaintiff and pictures and slides including the plaintiff, especially portraying the birth of the children.
- f) One Sears lawnmower.
- g) One dinette chair and two living room end tables.
- h) One-half of all record albums.
- i) One set of prints won by the plaintiff in Alaska.

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j) The original or copies of all bookkeeping records, including the files concerning Glen Cannon fire, VIP, other homes owned, Lamb's Creek, and bank records from and after 1978.

k) Train set purchased by plaintiff for children.

13. That the defendant pay to the plaintiff one-half of the \$10,000.00 payment for 1983 and one-half the surplus from the sale of the eleven (11) acre tract because of his prior obligation to provide this payment as a portion of his responsibility to the plaintiff and minor children.

14. That the defendant pay to the plaintiff one-half of the taxes paid from the sale of the eleven (11) acres.

15. That the defendant pay to the plaintiff the sum of \$18,500.00 as one-half of the sums withdrawn from the joint account prior to the separation of the parties.

The issue of division of marital property was *not before the court*. Although defendant obtained a divorce in December, 1981, the record does not disclose whether his action for absolute divorce was filed before or after 1 October 1981, the effective date of G.S. 50-20 and G.S. 50-21. At any rate, the pleadings in this case disclose no request by either party for division of property and the order does not reflect that the payments required thereby were in satisfaction of defendant's obligations to pay alimony and child support. We hold that the court had no authority, in this action for alimony and child support, to order a division of marital property by the transfer of personal property, the payment of funds formerly held in a joint bank account, or the payment of proceeds from the sale of jointly owned real estate. *See Clark v. Clark*, 44 N.C. App. 649, 262 S.E. 2d 659 (1980), *rev'd on other grounds*, 301 N.C. 123, 271 S.E. 2d 58 (1980).

Although we are cognizant that this case has been the subject of a surfeit of motions, hearings and orders, consuming a great deal of judicial time and expense, we must, nevertheless, vacate those portions of the order concerning alimony and child support and remand this case in order that the trial court can make adequate and appropriate findings of fact and conclusions of law, and set the amount of alimony and child support in accordance with the established rules set forth in the statutes and in

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the case law. Those portions of the order which purport to divide marital property are vacated in their entirety.

Vacated and remanded.

Judges WEBB and BECTON concur.

JAMES KIRBY HAMILTON, EXECUTOR OF THE ESTATE OF DARREN KEITH HAMILTON, DECEASED v. THE TRAVELERS INDEMNITY COMPANY, A STOCK INSURANCE COMPANY

No. 8529SC149

(Filed 15 October 1985)

1. Insurance § 69.2— uninsured motorist coverage—applicable to underinsured motorist

Where plaintiff's automobile policy defined an uninsured vehicle as one lacking coverage "in at least the amounts specified in [G.S. 20-279.5(c)]," the minimum liability coverage for bodily injury or death required by the statute at the time plaintiff's policy became effective was \$25,000, a motorist who struck and killed an insured under plaintiff's policy had liability coverage of only \$15,000, and plaintiff's policy provided uninsured motorist's coverage of \$25,000, the underinsured motorist's automobile was an "uninsured automobile" within the meaning of plaintiff's policy. However, defendant insurer was entitled to an offset for amounts already received by plaintiff for insured's death.

2. Insurance § 69— uninsured motorist coverage—stacking of separate coverages prohibited by policy

A provision in plaintiff's automobile insurance policy that the "limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages . . . because of body injury sustained by one person as the result of any one accident" prevented the stacking or aggregating of uninsured motorist coverages on three separate automobiles covered by plaintiff's policy.

APPEAL by plaintiff from *Lewis (John B., Jr.)*, Judge. Judgment entered 11 December 1984 in Superior Court, HENDERSON County. Heard in the Court of Appeals 19 September 1985.

This case involves construction of uninsured motorist (UM) liability coverages.

Roberts and Lawrence were racing in their automobiles when Roberts' car struck and killed plaintiff's intestate, plaintiff's son. Lawrence's insurer paid plaintiff its policy limit of \$25,000.

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Roberts' insurance policy, issued before 1 January 1980, provided only \$15,000 coverage, which the insurer duly paid to plaintiff. Plaintiff had liability insurance with defendant Travelers, with his intestate as an insured, issued after 1 January 1980, with three separate "coverage letters" for various family vehicles. Each coverage letter included separate UM coverage, with a separate premium, and an applicable liability limit of \$25,000. Plaintiff sued defendant Travelers, alleging that Roberts' car was an uninsured vehicle within the meaning of plaintiff's policy and that defendant was separately liable under each UM coverage for a total liability of \$75,000. From summary judgment for defendant, plaintiff appeals.

Toms & Bazzle, by James H. Toms and Ervin W. Bazzle, for plaintiff-appellant.

Roberts, Cogburn, McClure & Williams, by Isaac N. Northup, Jr., for defendant-appellee.

EAGLES, Judge.

[1] Plaintiff claims only under the UM coverage; no other liability is asserted under the policy. The parties do not dispute the facts, only the interpretation of the policy and applicable statutory language. Since the case presents only questions of law, summary judgment was appropriate. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The decision of the trial court is fully reviewable here. *North Carolina Reins. Facility v. North Carolina Ins. Guaranty Ass'n*, 67 N.C. App. 359, 313 S.E. 2d 253 (1984).

Under the terms of its UM coverage, defendant obligated itself to do the following:

To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of:

(a) bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured;

* * *

"[U]ninsured automobile" means:

(a) with respect to damages for bodily injury and property damage an automobile or other vehicle with respect to the

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ownership, maintenance or use of which there is, in at least the amounts specified in Subsection (c) of Section 20-279.5 of the North Carolina Motor Vehicle Safety and Financial Responsibility Act, neither (1) cash or securities on file with the North Carolina Commissioner of Motor Vehicles nor (2) a bodily injury and property damage liability bond or insurance policy, applicable to the accident with respect to any person or organization legally responsible for the use of such automobile or vehicle. . . .

The key language here is "in at least the amounts specified in Subsection (c) of Section 20-279.5 of the North Carolina Motor Vehicle Safety and Financial Responsibility Act." We note that this language parallels the statutory definition of "uninsured motor vehicle." G.S. 20-279.21(b)(3). As used here, however, it is part of a contract of insurance. Insurance contracts are construed like other contracts, but in case of ambiguity we construe them against the insurer and in favor of finding coverage. See *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970) (reviewing rules of construction).

One of the settled tenets of contract construction is that the law in effect at the time of the execution of the contract becomes part of the contract. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968). The contract here was executed after 1 January 1980, at which time the mandatory minimum UM coverage was \$25,000 per victim. The amending act which raised the minimum to \$25,000 per victim provided that it would not affect policies then in effect. 1979 N.C. Sess. Laws c. 832, s. 12. However, plaintiff's policy was not "in effect" at the time of the amendment, but only became effective when executed in early 1980. At the time the contract was entered into, the language "in at least the amounts specified in [G.S. 20-279.5(c)]" meant in at least the statutory amounts as they *then* existed. The policy's coverage letters tend to indicate to the insured that this was in fact the case: they provide \$25,000/\$50,000 coverage for "each person" and "each accident" respectively and premiums are charged accordingly. In the policy language no exceptions for vehicles with lower coverages appear. The contract language "in at least the amounts specified in [G.S. 20-279.5(c)]" allows the construction that plaintiff had contracted for the full \$25,000 UM coverage for any covered injury to insured. This is the *policy* language, not

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statutory language, and we therefore adopt that construction of the contract. Roberts' automobile was an "uninsured automobile" as defined under the policy issued by Travelers.

Had defendant wished to define its UM liability limits in terms that would have allowed it to limit its liability to the lesser amount called for in Roberts' policy, it could have done so. Defendant's policy could have provided expressly that compliance with the Act was the key to determining whether a tortfeasor was an uninsured motorist and whether the policy's UM coverage was invoked. It did not do so, but elected to frame its policy in terms of the "amounts specified in" G.S. 20-279.5(c).

We believe that our decision is consistent with the legislative intent and policy underlying compulsory UM coverage. UM coverage was designed by the legislature to provide certain minimum financial protection to persons injured by financially irresponsible motorists. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967). The legislature decided, as a policy matter, that a certain level of UM coverage was proper, and subsequently reconsidered and increased that minimum level. In increasing the minimum, the legislature did not expressly create any exceptions or exemptions, other than that motorists' existing policies would not be affected. We doubt that the legislature could have modified existing liability contracts. U.S. Const. Art. I, Section 10 cl. 1; *Hood v. Richardson Realty, Inc.*, 211 N.C. 582, 191 S.E. 410 (1937). The only exception to this legislative policy, as we construe it, would be that motorists with existing policies including UM coverage at the pre-amendment level could not claim up to the new limits if they were struck by an uninsured motorist. If those insureds, before their routinely scheduled policy renewal, desired more UM coverage at the higher, post-amendment level, they could renew their policies early. In the interim, they would not be in violation of the Financial Responsibility Act because they retained their existing, lower-limit policies nor would their insurers be forced to assume additional, uncontracted for liability. See *Oksa v. American Employers Ins. Co.*, 128 F. Supp. 681 (N.D.N.Y. 1954) (insurer has no duty to conform existing policy to new statutory minimums), *aff'd*, 218 F. 2d 585 (2d Cir. 1955) (per curiam).

On the other hand, motorists like plaintiff, who contracted and paid premiums for UM coverage *after* the effective date of

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the new limits, should receive coverage up to those higher limits. The legislative policy behind UM insurance laws is not to divide liability among insurers or limit insurers' liability, but to protect the motorist to the extent the statute requires protection against a specific class of tortfeasors. See *Pickering v. American Employers Ins. Co.*, 109 R.I. 143, 282 A. 2d 584 (1971). There is nothing in the legislative scheme suggesting that insured persons should have to concern themselves with the liability insurance limits of tortfeasors; in fact, the very purpose of UM coverage is to ameliorate that concern.

We are aware of authority that a tortfeasor is not an "uninsured motorist" even though, because of payments to other plaintiffs, the amount available from which to pay plaintiff's damages is less than the statutory minimum, and even though the result ironically means that the underprotected plaintiff would have been better off if injured by a totally uninsured motorist and permitted to proceed under his own UM coverage. See *Tucker v. Peerless Ins. Co., Inc.*, 41 N.C. App. 302, 254 S.E. 2d 656 (1979); *Rogers v. Tennessee Farmers Mut. Ins. Co.*, 620 S.W. 2d 476, 24 A.L.R. 4th 1 (Tenn. 1981); Annot. 24 A.L.R. 4th 13, Section 8 (1983). However, these cases, including *Tucker*, involved a tortfeasor fully insured to the required statutory coverage limit per accident *then in effect*. Those cases concern the legislatively mandated UM upper limit *per accident*, not UM coverage *per victim* as here. Where tortfeasors have been sued by single plaintiffs and there has been conflict between the current statutory minimum and the plaintiff's policy, however, courts have been more willing to find plaintiff's insurer liable at least for the difference between the tortfeasor's insurance and the statutory minimum. *Id.* section 4.

Of particular relevance is *Oleson v. Farmers Ins. Group*, 185 Mont. 164, 605 P. 2d 166 (1980). There plaintiff's UM coverage defined "uninsured motor vehicle" as one for which there was no liability insurance "in at least the amount specified by" the state's financial responsibility law. The court drew a distinction between the terms "specify" and "require," ruling that "specify" meant "to name in a specific manner" or "state precisely." *Id.* at 167-68, following *Aleksich v. Industrial Accident Fund*, 116 Mont. 127, 151 P. 2d 1016 (1944). The statutes under consideration set two different limits. In addition to resolving the conflict in statutory

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language in favor of plaintiff, the court held that the ambiguity should also be resolved in plaintiff's favor based on general principles of insurance contract law. In holding that the higher coverage limit applied, the Montana court reviewed numerous decisions and observed that where minimum limits conflict, courts typically choose the higher limits.

For the reasons stated, we hold that Roberts' vehicle was an "uninsured automobile" within the meaning of plaintiff's insurance policy with defendant. Under the policy, defendant agreed to provide UM coverage up to \$25,000 for this accident. However, other policy language states that "Any amount payable to an insured under [the UM coverage] shall be reduced by . . . all sums paid to such insured . . . by or on behalf of a person legally liable therefor. . . ." Plaintiff admits that defendant is entitled to offset amounts already received. Plaintiff has already received more than \$25,000 from Roberts' and Lawrence's insurers, and therefore has ostensibly lost his rights under the policy.

[2] Notwithstanding this policy provision, plaintiff argues that each of the three coverage letters provides separate UM coverage paid for by separate premiums, and that these, construed separately, should be considered in the aggregate or "stacked" to yield a total coverage of \$75,000. Understandably "stacking" of UM coverage has caused some controversy. See 8C J. Appleman & J. Appleman, *Insurance Law & Practice*, Sections 5106-8 (1981). Apparently stacking or aggregating coverages may occur under North Carolina's UM scheme. In *Moore v. Hartford Fire Ins. Co.*, *supra*, the Supreme Court suggested that an insured was not limited to the statutory amount if his other loss was greater than the statutory amount and more than one policy covered the accident. Compare *Turner v. Nationwide Mut. Ins. Co.*, 11 N.C. App. 699, 182 S.E. 2d 6 (applying *Moore*), *cert. denied*, 279 N.C. 397, 183 S.E. 2d 247 (1971). In *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978), the court held that policy provisions which require that the terms of the policy should "apply separately" to separate automobiles insured under a single policy would allow stacking of medical payments coverages except where there was unambiguous language establishing that the per accident limitation applied regardless of the number of automobiles insured under the policy or other unambiguous language tying the cover-

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ages to specific automobiles. See *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, *supra* (coverages tied to specific cars, no stacking). It appears then that if stacking is allowed by the policy's terms, the law of North Carolina would permit it.

This policy, no doubt reflecting the "unambiguous language" requirement of *Woods*, *supra*, contains the following language relevant to UM coverage:

The limit of bodily injury liability stated in the declarations as applicable to "each person" is *the limit of the company's liability for all damages*, including damages for care or loss of services, because of bodily injury sustained *by one person as the result of any one accident*. . . . (Emphasis added.)

The above provision, contained in the single policy issued to plaintiff, applied to all three coverages. Under *Woods*, *supra*, it operates to prevent stacking of the separate coverages. Even though it does not contain specific words from *Woods* such as "regardless of the number of automobiles insured under the policy," the effect is clearly the same. Therefore, we hold that under this policy plaintiff cannot aggregate or stack UM coverages.

Accordingly, the limit of defendant's liability here was \$25,000. Plaintiff has received more than that amount, and admits defendant's right to offset. We therefore conclude that the trial court ruled correctly in granting summary judgment for defendant. The judgment appealed from is

Affirmed.

Judges JOHNSON and PARKER concur.

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STATE OF NORTH CAROLINA v. JAMES A. WATKINS

No. 8512SC38

(Filed 15 October 1985)

1. Parent and Child § 2.2; Criminal Law § 169.5— felonious child abuse—evidence that social worker previously in defendant's home—no prejudicial error

There was no prejudice in an action for felonious child abuse in the admission of testimony that a social worker had previously had occasion to be in defendant's household where there was evidence that defendant was home alone with the child when she received her injuries, defendant's explanation that he found the child holding onto the faucet with both hands was completely inconsistent with her injuries, the injuries were consistent with the hands being immersed into hot liquid, expert medical testimony was that the burns were caused by someone holding the child's hands in hot liquid, and defendant made inconsistent statements concerning his familiarity with the location of the water heater. There was sufficient evidence to sustain defendant's conviction while disregarding the statements of the witness complained of here. G.S. 15A-1443(a).

2. Criminal Law § 169.5— felonious child abuse—unresponsive answer by nurse—no prejudicial error

There was no prejudicial error in an action for felonious child abuse where a nurse treating the victim stated that she got sick when asked what she did during the child's treatment for burns, then stated that she had to hold the child down immediately after defense counsel objected and the court ruled on the objection. The witness's response that she got sick was not responsive to the State's question and was irrelevant to the issues at trial, but was an honest statement by the witness as to what she did during the child's treatment, and the testimony as to the nurse's role in holding the child down while the doctor chipped away skin and pulled it off was previously admitted without objection.

APPEAL by defendant from *Herring, Judge*. Judgment entered 19 September 1984 in Superior Court, HOKE County. Heard in the Court of Appeals 18 September 1985.

Defendant was convicted of felonious child abuse in violation of G.S. 14-318.4.

The essential facts are:

On 9 March 1984 Susan Moss, a social worker supervisor with the Hoke County Department of Social Services, received a report of child abuse involving Rhonda Monroe. Rhonda Monroe was the three-year-old daughter of Bernice Monroe. She lived

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part time with her mother and the defendant at the Meadow Wood Mobile Home Park. Upon receiving this report Ms. Moss visited Rhonda's home accompanied by Detective Harris of the Hoke County Sheriff's Department. Ms. Moss' duties as a social worker involved investigating complaints of child abuse and neglect. The defendant was home alone at the residence when visited by Ms. Moss and Detective Harris.

Ms. Moss told the defendant that she was investigating a report of child abuse. She asked him to tell her how the child was burned. The defendant explained that the child's mother had gone to work and that he and the child were at home alone. He stated that the child was sitting at the table eating and that she asked to wash her hands. He got up to go to the bathroom. When he was coming out of the bathroom, he heard her cry out "Hot!" and then heard a chair fall to the floor. He stated that the child had pulled her chair up to the sink to wash her hands and that when he got into the kitchen she was gripping the faucet with both hands to prevent herself from falling. The sink was approximately one-half full of hot water. The defendant went to a neighbor's house to call the child's mother at work. Ms. Monroe came home and took the child to see a doctor. The doctor told Ms. Monroe to take her to the hospital and she took her to Cape Fear Valley Medical Center.

Ms. Moss asked the defendant's permission to check the hot water temperature and asked him to show her the hot water heater. He stated that he did not know where it was but he thought it was in the bathroom. Ms. Moss, Detective Harris and the defendant went into the bathroom but the hot water heater was not there. They walked outside the mobile home to an area outside the bathroom that appeared to contain the heater. Detective Harris noticed fresh shoe prints in the ground around the area underneath the water heater. The shoe prints matched the soles of the shoes the defendant was wearing that day. There were pieces of fiberglass insulation lying on the ground. The water heater was found behind a panel on the outside of the mobile home. The panel was secured to the structure by several screws. Detective Harris testified that there were scratches around the screwheads that were consistent with them having been removed and replaced. The hot water heater was surrounded by fiberglass insulation in the wall. When asked about the

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footprints, the defendant stated that he had been working on a water leak. The hot water temperature was set at 165 degrees.

Nurse Payne of the Cape Fear Valley Medical Center testified that Rhonda Monroe was treated for second and third degree burns of the hands. Ms. Payne described the burns as glove type burns that covered both hands with a "very even" line around each wrist. There were no splash marks on the child's skin. The child was hospitalized for approximately one month.

When Rhonda was released from the hospital, Ms. Moss took her to see Dr. Townsend, the pediatric medical examiner of Hoke County. Based on his seven years experience as pediatric medical examiner and his having examined twenty or thirty cases of suspected child abuse, the court permitted Dr. Townsend to testify at trial as an expert in the area of child medical examination. Dr. Townsend examined Rhonda and the photographs taken of her hands while she was under treatment at the hospital. Dr. Townsend characterized the burns as "emergent type burns," the kind received when some part of the body is "stuck down into hot liquid." He described the burns as "clean burns" of "glove type distribution" as if the hands were "stuck down into the water down to the wrist" with "no splash or uneven burns up above." Dr. Townsend stated that the injuries were not consistent with falling in the water because of the lack of splash marks. Further, Dr. Townsend stated that the burns were not consistent with the child holding onto the kitchen faucet because the severity of the burns was such that if the child had done that the skin would have been torn off of her palms. The photographs showed large blisters on the child's palms with no tears in the skin. Dr. Townsend stated that in his opinion the burns were typical of someone holding the child's hands in hot liquid.

The defendant offered no evidence. From a judgment imposing a sentence of five years, the defendant appealed.

Attorney General Thornburg, by Assistant Attorney General Robert E. Cansler, for the State.

Assistant Public Defender Staples Hughes, for the defendant-appellant.

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EAGLES, Judge.

I

[1] The defendant first contends that the trial court committed prejudicial error by admitting Susan Moss' testimony that she had been in defendant's home before this incident. We disagree.

The defendant complains about the following exchange during the State's examination of the social worker, Susan Moss.

Q. Did you know Mr. Watkins prior to March 9?

A. Yes. I did.

Q. How long have you known Mr. Watkins?

A. For about a month, several weeks.

Q. Had you had occasion to be in his household before?

Mr. Hughes: Objection.

Court: Overruled.

A. Yes. I did.

Mr. Hughes: Move to strike.

Court: Denied.

Q. When was that?

A. In February.

Mr. Hughes: Objection. Move to strike.

Court: Overruled and denied.

Defendant contends that the question of whether the social worker had been in defendant's home before the date of Rhonda Monroe's injuries was totally irrelevant to any material issue of fact in the trial and was highly prejudicial. Evidence that has no logical tendency to prove a fact in issue is inadmissible. Its admission, however, will not be reversible error unless it misleads the jury or prejudices the opponent. *H. Brandis, Brandis on North Carolina Evidence*, Section 77 (rev. 2d ed. 1982). The defendant is entitled to a new trial only if the trial errors were material and prejudicial. *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981).

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The defendant has the burden of proving prejudice and in order to show prejudice the defendant must meet the requirements of G.S. 15A-1443(a). *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). G.S. 15A-1443(a) provides:

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

In this case the defendant failed to carry his burden of showing prejudice by the admission of the social worker's statements. There is no reasonable possibility that the outcome of the trial would have been different had these statements not been allowed in evidence.

The record on appeal and the transcript contain sufficient evidence to sustain the defendant's conviction while disregarding the statements of the witness complained of here. The defendant stated that he was home alone with the child when she received her injuries. The defendant's explanation that he found the child holding onto the faucet with both hands is completely inconsistent with her injuries. The child's palms were burned and covered with blisters that evidenced no tears in the skin. The medical expert testified that she would not have been able to hold onto the faucet with such severe burns and that, had she in fact done so, the gripping action would have ripped the burned skin from her palms. The injuries were consistent with the hands being immersed into hot liquid. The expert stated that in his medical opinion the burns were caused by someone holding the child's hands in hot liquid. Further, the defendant made inconsistent statements concerning his familiarity with the location of the water heater. Footprints matching his were on the ground next to the water heater. Scratches on the screwheads holding the panel covering the water heater indicated that the panel had been removed at some time before Detective Harris visited the defendant's residence. Fragments of insulation identical to the insulation

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covering the walls around the water heater were found lying on the ground near the panel.

We believe the evidence is sufficient to sustain the defendant's conviction notwithstanding the admission into evidence of the irrelevant statements by the social worker. We do not believe that a different verdict would have resulted if the complained of testimony had been excluded. Defendant's first assignment of error is overruled.

II

[2] Defendant's second and third assignments of error allege error in the admission of certain testimony of State's witness Nurse Nancy Payne. Defendant contends that the trial court committed prejudicial error by overruling his objection to Nurse Payne's statement that she "got sick" during the child's treatment and in denying his motion to strike her testimony that she had to hold the child down during treatment. We disagree.

The defendant complains about the following exchange during the State's examination of Nurse Payne.

Q. Did you have occasion to participate in the treatment of Rhonda Monroe during the time she was in the hospital?

A. Yes. I did.

Q. Can you describe what course of treatment or treatments were followed during the time she was in the hospital?

A. After all the dead tissue was removed, she was taken to the physical therapy department. And her hands were put in the whirlpool to help remove all the dead tissue.

Q. When you say the dead tissue was removed, can you tell the jury how that was done?

A. It was done by a surgeon and I holding her down and him chipping away skin and pulling it off.

Q. Was there any pain involved in that?

A. Yes. There was.

Q. Were you yourself involved in that procedure?

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A. Yes. I was.

Q. What did you do?

A. I got sick.

Mr. Hughes: Objection.

Court: Overruled.

A. I had to hold her down.

Mr. Hughes: Move to strike the answer.

Court: Denied.

The defendant argues that the witness' response that she "got sick" was irrelevant, unresponsive and highly prejudicial. He also argues that the response "I had to hold her [Rhonda] down" was repetitive and highly prejudicial. The defendant has not demonstrated any prejudice except to assert that it existed.

The transcript of this exchange makes it clear that the answer "I got sick" was not responsive to the State's question. Defendant argues that the response "I got sick" leaves the impression that the witness was coached to give that answer. While the response is irrelevant to the issues at trial, it appears to have been an honest statement by the witness as to what she did during the child's treatment.

The second statement "I had to hold her down" immediately followed defense counsel's objection and the court's ruling on the objection and motion to strike. There was no new question asked of the witness at that time. The same testimony as to the nurse's role in holding the child down while the doctor chipped away skin and pulled it off was previously admitted without objection. *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4, cert. denied, 389 U.S. 865 (1967); *Shelton v. Southern Railway Co.*, 193 N.C. 670, 139 S.E. 232 (1927). While the answer was repetitive, its repetition did not prejudice the defendant. Accordingly, these assignments of error are overruled.

From a review of the record we conclude that the defendant received a fair trial free from prejudicial error.

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No error.

Judges JOHNSON and PARKER concur.

SAM BELFIELD v. WEYERHAEUSER COMPANY AND FIREMAN'S FUND INS.
CO.

No. 8510IC51

(Filed 15 October 1985)

1. Master and Servant § 91— workers' compensation—time limitation for filing claim—equitable estoppel

A party may be equitably estopped from asserting the two-year time limitation of G.S. 97-24 as a bar to jurisdiction of a claim for workers' compensation.

2. Master and Servant § 91— workers' compensation—estoppel to assert time limitation

Defendant employer was equitably estopped from asserting the two-year time limitation of G.S. 97-24 as a bar to plaintiff sawmill worker's claim for compensation for an eye injury where a secretary at the sawmill repeatedly assured the illiterate plaintiff that she would take care of the paper work in his case, and the secretary referred plaintiff to a lawyer who told plaintiff there was nothing he could do, but the lawyer worked for the employer.

APPEAL by defendants from Order of the Industrial Commission entered 25 October 1984. Heard in the Court of Appeals 28 August 1985.

Plaintiff filed a claim for compensation approximately six years after the accident which allegedly caused his injury. Defendants challenged the Commission's jurisdiction to hear the claim. The full Commission, Chairman Stephenson dissenting, affirmed the Deputy Commissioner's ruling that defendants by their conduct were estopped to plead the two year limitation of G.S. 97-24.

The full Commission considered the following evidence: Plaintiff worked at Weyerhaeuser's sawmill, where he had worked for 30 years. A piece of wood struck him in the head, knocking him out. He awoke in the back of a truck driven by his foreman, who took him to a doctor. The doctor gave plaintiff some medication

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for pain and plaintiff returned to work the next day. Plaintiff later went to see other doctors but his vision deteriorated until he became blind in one eye. Plaintiff testified that Weyerhaeuser workers who had two or more accidents risked firing and that he was scared of losing his job. He also was afraid to report his pain and loss of vision from the accident. At the time of the accident plaintiff was 60 years old and totally illiterate. He had never attended school.

Following the accident, plaintiff began to ask "Ms. Brenda" regularly whether Weyerhaeuser would do anything for him. Ms. Brenda was Brenda Howell, a secretary at the mill. She told plaintiff she would take care of his paper work. Plaintiff never received any benefits, however. Ms. Brenda later asked him if he wanted to see a lawyer, and referred him to a lawyer who told plaintiff there was nothing he could do. Plaintiff later learned that this lawyer worked for Weyerhaeuser. Plaintiff continued to see Ms. Brenda regularly; she continued to tell him that she would "take care of" his paper work when the eye got "good enough." Finally, after plaintiff had retired, a social worker visited his home and learned of the origin of his eye problem. She made inquiries and put plaintiff in touch with counsel. A claim was filed in 1982, six years after the accident. From the Commission's order that defendants were estopped from pleading the absence of jurisdiction pursuant to G.S. 97-24, defendants appeal.

Johnson and Jones, by Thomas L. Jones, Jr., for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III, and Dayle A. Flammia, for defendant-appellants.

EAGLES, Judge.

Although the parties do not raise the issue, we first consider whether this appeal is properly before us. *In re Watson*, 70 N.C. App. 120, 318 S.E. 2d 544 (1984), *disc. rev. denied*, 313 N.C. 330, 327 S.E. 2d 900 (1985). The effect of the full Commission's order is not to dispose of the merits of the claim but merely to allow the proceeding to be heard. Accordingly, the order is interlocutory. *See Poret v. State Personnel Comm.*, 74 N.C. App. 536, 328 S.E. 2d 880, *disc. rev. denied*, 314 N.C. 117, 332 S.E. 2d 491 (1985). Nevertheless, in our discretion we consider the merits.

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I

The dispositive issue on appeal is whether we must apply the literal terms of G.S. 97-24(a): "The right to compensation under [the Workers' Compensation Act] shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident." By its language the statute ostensibly operates to automatically dispose of plaintiff's claim.

II

A

We do not end our inquiry there, however. It has been held repeatedly that the requirement that a claim be filed within the time limits set by G.S. 97-24 is a condition precedent to the right to compensation and not a statute of limitations. *See, e.g., Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E. 2d 109 (1948); *Lineberry v. Town of Mebane*, 218 N.C. 737, 12 S.E. 2d 252 (1940), *rev'd on other grounds on rehearing*, 219 N.C. 257, 13 S.E. 2d 429 (1941). This distinction has resulted in some judicial uncertainty. *See Joyner v. Lucas*, 42 N.C. App. 541, 257 S.E. 2d 105 (analyzing like distinction in paternity case), *disc. rev. denied*, 298 N.C. 297, 259 S.E. 2d 300 (1979). The harsh and inconsistent results that may follow have been the subject of judicial criticism. *See Perdue v. Daniel International, Inc.*, 59 N.C. App. 517, 296 S.E. 2d 845 (1982) (Wells, J., concurring in result), *disc. rev. denied*, 307 N.C. 577, 299 S.E. 2d 647 (1983). Various opinions contain language suggesting that the condition precedent is jurisdictional. *Id.*; *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 309 S.E. 2d 273 (1983), *disc. rev. denied*, 311 N.C. 407, 319 S.E. 2d 281 (1984). It is well established that the Industrial Commission possesses only a limited jurisdiction created by statute. *Letterlough v. Atkins*, 258 N.C. 166, 128 S.E. 2d 215 (1962). Jurisdiction cannot ordinarily arise by estoppel. *Weston v. Sears Roebuck & Co.*, *supra* (discussing jurisdiction of Commission); *In re Sauls*, 270 N.C. 180, 154 S.E. 2d 327 (1967) (jurisdiction of court).

B

[1] The Supreme Court has however expressly left unresolved the question of "whether under all circumstances a party to a proceeding before the Industrial Commission can, or cannot, be estopped to attack its jurisdiction over the subject matter. . . ."

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Hart v. Thomasville Motors, Inc., 244 N.C. 84, 89, 92 S.E. 2d 673, 677 (1956); see also *Weston v. Sears Roebuck & Co.*, *supra*; *Gantt v. Edmos Corp.*, 56 N.C. App. 408, 289 S.E. 2d 75 (1982). In those cases it was held that their facts would not justify such a result even if estoppel were permitted to be pleaded. None of the decisions reached the issue of whether estoppel could be pleaded in bar of an attack on the Commission's jurisdiction. The question has not been reached since, but now is squarely before us. We hold that a party may be equitably estopped from asserting the time limitation in G.S. 97-24 as a bar to jurisdiction.

In *Joyner v. Lucas*, *supra*, we held that a time limitation then contained in G.S. 49-14 regarding civil actions to establish paternity was only procedural and not substantive, and therefore estoppel arising from defendant's conduct could bar dismissal for failure to timely file an action for support. There we distinguished cases applying former G.S. 28-173 as a "condition precedent" partially on the ground that G.S. 49-14 provided separately for time limitations. G.S. 97-24 is similarly independent of those statutory provisions establishing the right to compensation. In *Joyner* the court also relied on the remedial nature of G.S. 49-14 and our duty to construe remedial statutes liberally to effect the legislative intent. Similarly, it has been repeatedly held that the Workers' Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees. See, e.g., *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976). We note that the distinction at issue in *Joyner* and in the instant case arises from the application of court-made rules of statutory construction. The legislative intent should supersede those rules. See *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979); 82 C.J.S. Statutes Section 311 (1953). The *Joyner* court expressed concern over the potentially harsh results arising from a strict application of the time limitation. We find the *Joyner* rationale both relevant and persuasive here.

C

In addition, a substantial body of case law indicates that estoppel is not foreign to Commission proceedings. It may apply where the claim is based on a change of condition under G.S. 97-47. See *Watkins v. Central Motor Lines, Inc.*, 10 N.C. App. 486,

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179 S.E. 2d 130, *rev'd on other grounds*, 279 N.C. 132, 181 S.E. 2d 588 (1971); *Ammons v. Z. A. Sneed's Sons, Inc.*, 257 N.C. 785, 127 S.E. 2d 575 (1962). Although, in contrast to G.S. 97-24, G.S. 97-47 is clearly *not* jurisdictional, *Watkins v. Central Motor Lines, Inc.*, *supra*, the purposes of the two sections appear identical, as is the relationship of the parties involved. In fact, it may be more equitable to apply estoppel to G.S. 97-24, since a claimant under G.S. 97-47 must have already been before the Commission, *see Biddix v. Rex Mills, Inc.*, #1, 237 N.C. 660, 75 S.E. 2d 777 (1953), and thereby should have become better informed of its procedures.

We note too that elsewhere in the Workers' Compensation Act the procedural requirements are somewhat relaxed. The legislature has expressed a preference for summary and simple procedure before the Commission. G.S. 97-80(a). Furthermore, the legislature has avoided absolute notice requirements, instead allowing employees to assert claims even upon total failure to notify the employer as otherwise required by statute. G.S. 97-22, 97-23. The Supreme Court has recognized that procedure before the Commission need not conform strictly to that followed in the courts. *Maley v. Thomasville Furniture Co.*, 214 N.C. 589, 200 S.E. 438 (1939). We believe a rigorous application of the two year limitation of G.S. 97-24 would be inconsistent with this otherwise informal procedure.

D

Finally, we have reviewed the workers' compensation law of other jurisdictions and note that the weight of authority seems to support our decision. *See* 3 A. Larson, *The Law of Workmen's Compensation*, Section 78.45 (1983). As Larson summarizes:

The commonest type of case is that in which a claimant, typically not highly educated, contends that he was lulled into a sense of security by statements of employer or carrier representatives that "he will be taken care of" or that his claim has been filed for him or that a claim will not be necessary because he would be paid compensation benefits in any event. When such facts are established by the evidence, the lateness of the claim has ordinarily been excused.

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Id., Section 78-45 at 15-302 through 15-305. Representative cases include: *Gayheart v. Newnam Foundry Co. Inc.*, 271 Ind. 422, 393 N.E. 2d 163 (1979) (commission had jurisdiction to decide whether fraud of employer allowed it to hear time-barred claim); *Perkins v. Aetna Casualty & Surety Co.*, 147 Ga. App. 662, 249 S.E. 2d 661 (1978) (semi-literate employee falsely told that employer had no coverage; employer estopped from asserting time bar) *appeal dismissed*, 243 Ga. 701, 256 S.E. 2d 792 (1979); *Ashcraft v. Hunter*, 268 Ark. 946, 597 S.W. 2d 124 (Ark. App. 1980) (employer's conduct indicating that no formal filing of claim necessary estopped assertion of time bar).

E

[2] For the reasons discussed we conclude that equitable estoppel may prevent a party from raising the time limitation of G.S. 97-24 to bar a claim. We further conclude that the facts of this case justified the application of estoppel to prevent defendant from pleading the statutory bar. Although Ms. Brenda was not a corporate officer, it is clear that she acted as an agent of the corporation and was, in her dealings with plaintiff, the administrative representative of Weyerhaeuser. We are unaware of the existence of any requirement, as defendants appear to contend, that she had to be a corporate officer in order to act for Weyerhaeuser. See G.S. 55-34 (statute does not require specific officers but refers to "officers and agents"). Her assurance that she would "take care of" the paper work must be viewed in light of all the circumstances, particularly plaintiff's illiteracy, as well as the fact that a previous injury suffered by plaintiff had apparently been processed without his active involvement. Although plaintiff did see a lawyer, the lawyer was one suggested by and retained by Weyerhaeuser. Defendants' conduct fits the pattern described by Larson as being sufficient to raise an estoppel against them. By comparison, in *Weston v. Sears Roebuck & Co.*, *supra*, where we held that no estoppel could be raised, plaintiff was told only once that the employer would take care of his claim, later independently consulted an attorney, and waited nine years to file his claim. We find the facts here to be compelling and conclude that the Commission did not err in ruling that plaintiff's claim was not time-barred.

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III

Defendants raise several other assignments of error. We have reviewed them carefully and find that they are without merit. The order of the full Commission contains sufficient findings based on properly considered evidence to support its jurisdictional conclusions; any surplusage in the order does not require reversal. The order appealed from is accordingly

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. W. D. HOPE

No. 8416SC1196

(Filed 15 October 1985)

Robbery § 4.7— robbery with a firearm—use of force in robbery—evidence not sufficient

The evidence was insufficient to support a conviction for robbery with a firearm where defendant entered a store wearing a long blue coat, put on a tan coat at the back of the store, left his own coat in the rear of the store, started to walk out without paying for the tan coat, argued with the clerks when challenged by them, threatened to kill one of the clerks if he did not keep quiet after the clerk noticed that defendant had a gun, and started out the door. The element of force or intimidation necessary for an armed robbery must be precedent to or concomitant with the taking, and the crime of larceny was complete when defendant put on the tan coat, left his own in the rear of the store, started to walk out, and responded to the clerk's comment "that's not your coat" with the reply "yes, it is"; at most, the victims were induced by the threats to relent in their attempts to convince defendant to give back what he had already taken.

Judge WEBB dissenting.

APPEAL by defendant from *Barnette, Judge*. Judgment entered 24 May 1984 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 27 August 1985.

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Attorney General Thornburg, by Associate Attorney General Dolores O. Nesnow, for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

BECTON, Judge.

From a conviction of robbery with a firearm, defendant, W. D. Hope, appeals.

On 31 January 1984, Williamson and Barringer were working at Ned's Outlet and Texaco when defendant entered the store wearing a long blue coat. Defendant went to the back of the store, and he returned wearing a tan coat belonging to Ned's Outlet. He left his coat as an "exchange." Defendant did not attempt to pay for the coat, and he walked toward the store's exit.

Williamson stopped defendant and told him he was wearing a coat belonging to the store. Defendant denied this, and Williamson brought defendant to the back of the store where they found the blue coat defendant had left. Williamson then brought defendant to Barringer in the front of the store, and Williamson went to the cash register. Defendant told Barringer he wanted to trade coats, but Barringer said they didn't trade coats. Defendant then headed for the exit once again, and Barringer asked him to stop. At this point, Williamson noticed a gun in defendant's pants and warned Barringer.

Barringer testified at trial that he told Williamson to call the police, and that defendant then threatened to kill Barringer if he did not keep quiet. Williamson's testimony indicated that defendant made the threat before Barringer told Williamson to call the police.

Of four possible verdicts—guilty of robbery with a firearm, guilty of common law robbery, guilty of misdemeanor larceny, and not guilty—the jury returned a verdict of guilty of robbery with a firearm.

Defendant raises two contentions on appeal: (1) the evidence was insufficient to go to the jury on the charge of robbery with a firearm because the threat of force was subsequent to the taking, and (2) appointed defense attorney failed to provide effective

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assistance of counsel at the sentencing hearing. We agree with defendant on his first argument and reverse the conviction. Therefore, we need not address the second argument.

Defendant asserts that the charge of robbery with a firearm should have been dismissed because the evidence was insufficient to prove the element of taking by force or a threat of force. On a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense and that the defendant was the perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980). Defendant's motion to dismiss the armed robbery charge should have been granted unless there was substantial evidence of each element of armed robbery, which is "the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm or other deadly weapon with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property." *Id.* at 102, 261 S.E. 2d at 119 (citation omitted); see N.C. Gen. Stat. Sec. 14-87(a) (1981).

The evidence shows that, while still in the back of the store, defendant removed his own blue coat and put on a tan coat belonging to Ned's Outlet. Defendant then walked toward the exit, leaving his old blue coat in the back of the store, without attempting to pay for the tan coat. The State presented the testimony of Mr. Williamson as follows:

Q. After you saw that the defendant was leaving—with the defendant leaving with the coat on, what, if anything, did you say to him or do?

A. As he was walking toward the door, I said, "Excuse me." He stopped. I said, "That's not your coat," and then he started to arguing with me.

Q. Did you—do you recall the words of the argument?

A. Yes.

Q. Okay. What did the defendant say to you?

A. Okay. As I stopped him, I said, "That's not your coat." He said, "Yes, it is." I said, "That's not the coat you came in here

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with." He said, "Yes, I did." And I took him to the back of the store where he had laid his coat.

Mr. Williamson testified that he then took defendant to Donald Barringer, who spoke briefly with defendant. Mr. Williamson's testimony continued:

Q. Okay. And what happened at that time?

A. Well, as I was watching him, he started back out toward the front, and that's when Donald started yelling at him, telling him that was his coat.

Q. Did the defendant still have on the coat at that time?

A. Yes, sir.

Q. Now, you stated that Donald Barringer told him what?

A. That wasn't his coat, that it belonged to the store.

Q. What happened, then?

A. Okay. As he was telling—yelling at him, he just kept walking, just like he didn't hear it.

Q. Go on.

A. And then after he got on a little closer to me, that's when Donald stopped him and when he did, that's when I pointed out the gun.

* * *

Q. Now, at any time, did you hear the defendant say anything after you informed Donald Barringer that he had the gun?

A. Yes. He told Donald that he better be quiet or he kill him.

Q. Where were you standing at this time?

A. Behind the counter.

Q. What did you do after the defendant told Donald Barringer to be quiet, that if he didn't be quiet, he would kill him?

A. Donald told me to call the police, and I was holding the phone when he said that, but I was scared to dial.

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* * *

Q. How long did the defendant remain there after he told you that he would kill Donald Barrington [sic]?

A. After he said that, he started out the door.

Q. What did you do at that point?

A. I called the police.

Defendant had taken, and indicated his intention to keep, the tan coat before making any threats. The issue remains whether the technical "taking" was part of a "continuous transaction," as the State contends, or a discrete event ending before the threats were made.

The State advances several theories as to when the armed robbery transaction, and thus the taking, was completed: "when the defendant left the premises"; when the victims were induced to "relinquish their control of the property"; when the defendant left "the presence of one or both victim(s)"; and when the defendant took "possession" of the tan coat, rather than mere "custody." We are not convinced.

It is now well established that larceny does not require asportation beyond the confines of the building and may be completed before the perpetrator leaves the premises of the victim. *State v. Reid*, 66 N.C. App. 698, 311 S.E. 2d 675 (1984); *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969). In the case *sub judice*, when the defendant put on the tan coat, left his own in the rear of the store, started to walk out, and responded to Mr. Williamson's comment "That's not your coat" with the reply "Yes, it is," the crime of larceny was complete. The victims "relinquished control" of the coat before the threats; they lost control of the coat when the defendant put it on and walked toward the exit. At most, the victims were induced by the threats to relent in their attempts to convince defendant to give back what he had already taken. The defendant had more than "custody" of the coat, as a customer trying on a coat might have, once he expressed his intent to keep it without paying. This occurred before the threats were made.

The element of force or intimidation necessary for an armed robbery must be precedent to or concomitant with the taking.

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State v. Richardson, 308 N.C. 470, 476, 302 S.E. 2d 799, 803 (1983); *State v. John*, 50 N.C. 163 (1857); *State v. Chapman*, 49 N.C. App. 103, 270 S.E. 2d 524 (1980). The use of force or intimidation to retain property taken unlawfully does not transform a larceny into a robbery. *Richardson*. Similarly, evidence of the use of force to escape is not sufficient to support an armed robbery conviction. *John*.

The defendant in *John* had reached into the victim's pocket. The victim seized defendant's arm, and they struggled until defendant fell off the wagon and escaped with the victim's property. The Supreme Court found the evidence of highway robbery insufficient because there was nothing to show that violence was used to induce the victim to part with his property out of fear. 50 N.C. at 167. In *Richardson*, the Supreme Court reaffirmed this 126-year-old decision:

[T]he court [in *John*] viewed the struggle between the defendant and the victim as "fairly imputable to an effort on the part of the prisoner to get loose from [the victim's] grasp and make his escape." [*John*] at 169. The holding in *John* indicates that in this State, the defendant's use of force or intimidation must necessarily precede or be concomitant with the taking before the defendant can properly be found guilty of armed robbery. That is, the use of force or violence must be such as to induce the victim to part with his or her property. This rule appears to be in accord with the majority of jurisdictions.

308 N.C. at 477, 302 S.E. 2d at 803 (citations omitted). In the case at bar, the threats were made, not to induce the victims to part with the coat, but to escape, retain the coat, and induce the victims to refrain from calling the police. Even the testimony of Williamson indicates that the threats were made only after the gun was inadvertently noticed by Williamson. We believe the threats are "fairly imputable to an effort on the part of the [defendant] to . . . make his escape." *John*, at 169; see *Chapman*, 49 N.C. App. at 106, 270 S.E. 2d at 526.

The State contends that the taking and the threats were so joined in time and circumstance as to be inseparable. The State cites the Model Penal Code Sec. 222.1(1) (1962) for the proposition that violence used "in an attempt to commit theft or in flight

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after the attempt or commission" constitutes robbery. In this regard, we note that the Model Penal Code Sec. 222.1(1) stands in contrast to the settled law in this jurisdiction. *See Richardson*. The State also cites three cases in support of the "continuous transaction" theory: *State v. Handsome*, 300 N.C. 313, 266 S.E. 2d 670 (1980); *State v. Lilly*, 32 N.C. App. 467, 232 S.E. 2d 495, *cert. denied*, 292 N.C. 643, 235 S.E. 2d 64 (1977); *State v. Dunn*, 26 N.C. App. 475, 216 S.E. 2d 412 (1975). These cases do not control the present case because each involves violence that *preceded* the taking and, in effect, made the taking possible.

For the reasons stated above, we reverse the conviction of defendant for armed robbery and order a new trial on the misdemeanor larceny charge.

Reversed and new trial ordered.

Judge WEBB dissents.

Judge MARTIN concurs.

Judge WEBB dissenting.

I dissent. I believe the evidence for the State shows the use of the firearm was concomitant with the taking of the property. The test as to when a larceny is complete should not be the test as to whether a deadly weapon was used in the taking. In this case the jury could have found that the defendant started out of the building with the property. When challenged he used a deadly weapon to remove the property from the building. This supports a finding that deadly force was used to take the property.

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STATE OF NORTH CAROLINA v. FELIX TORRES AND TIMOTHY WAYNE FORSYTH

No. 8414SC1167

(Filed 15 October 1985)

1. Criminal Law § 162— denial of motion in limine—necessity for objection to evidence at trial

Even though the trial court denied defendants' motion in limine to prevent the admission of certain rings, defendants' failure to object to the introduction of the rings at trial constituted a waiver of the objection so that admission of the rings will not be reviewed on appeal.

2. Criminal Law § 102.6— jury argument—gun not admitted into evidence—harmless error

The trial court erred in allowing the prosecutor over defense objections to hold a pellet gun up to the view of the jury during his closing arguments and to refer to the gun when the gun had not been offered or admitted into evidence, but such error was not prejudicial because defendant was charged with assaulting the victim with metal rings rather than with a gun.

3. Assault and Battery § 17— felonious assault—rings as deadly weapons—refusal to set verdict aside

The trial court did not abuse its discretion in refusing to set aside a verdict of guilty of assault with a deadly weapon inflicting serious injury on the ground that large metal rings worn by defendants were not deadly weapons.

4. Criminal Law § 99.5— admonishment of counsel—no error

The trial court did not err in admonishing defendant's attorney to keep her comments to herself when the attorney improperly remarked on a witness's testimony.

5. Criminal Law § 138— intoxication reducing culpability—failure to find as mitigating factor

The trial judge did not err in failing to find as a mitigating factor for assault with a deadly weapon inflicting serious injury that defendants' intoxication reduced their culpability for the crime on the basis of testimony by one defendant that he was feeling sick because he had been high for three days and didn't have much to eat, and testimony by the second defendant that he was drunk and high and did not remember exactly what he was doing, since there was no showing that defendants' condition reduced their culpability or that defendants' evidence was manifestly credible. G.S. 15A-1340.4(a)(2)(d).

6. Criminal Law § 138— limited mental capacity reducing culpability—failure to find as mitigating factor

The trial court did not err in failing to find as a mitigating factor that defendant's immaturity or limited mental capacity significantly reduced his culpability for the crime on the basis of a statement by defense counsel that defendant was a "Willie M child" who never received treatment.

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APPEAL by defendants from *Bailey, Judge*. Judgment entered 18 July 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 23 August 1985.

Defendants were charged in proper indictments with assault with a deadly weapon inflicting serious injury and injury to personal property.

At trial the victim Douglas Wayne Thurman, age seventeen, testified that on 15 May 1984 he was a senior at Northern High School. He drove to school, parked his car and walked up to the school with his friend Thomas Swain. Defendant Torres called him, and Thurman turned around and walked towards Torres to find out what he wanted. Defendant Torres punched Thurman in the chin. Thurman fell down between two cars. Defendant Forsyth joined Torres and both defendants started hitting Thurman in the face. Defendant Torres had a knife in his belt and four large silver rings on his hand. One of the defendants had a gun. After the beating, Thurman was taken to the hospital and treated for a broken jaw.

On cross-examination Thurman said that he did not know if defendant Forsyth hit him, and he did not know if defendant Forsyth was wearing any rings.

Thomas Swain, Jr., testified that defendant Torres hit Thurman first and knocked Thurman to the ground. Thurman tried to get away. Then defendant Forsyth joined Torres in hitting Thurman.

William Roger Akers, Jr., who was a senior at Northern High School on 15 May 1984, testified:

A. Well, I arrived at school about eight o'clock, and I started walking up to school, and I heard something behind me. I turned around and there was Doug standing behind me covered with blood, and I looked over and I saw Mr. Torres jump up on the car with a knife in his hand, and then I looked over at Mr. Forsyth and he pointed a gun at me and asked me if I wanted some too.

MR. VANN: Motion to strike.

COURT: Motion denied.

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A. I said, "Doug, watch out, he has a gun, he has got a gun," and we jumped behind a car and we went on up to the school.

Akers said the gun looked like a .45 caliber automatic.

Kimberly Ann Bailey testified that on 15 May 1984 she drove her 1976 Honda Accord to school and at 11:00 a.m. she went out to the parking lot and saw that the roof of her car was caved in, there was a dent over the windshield, and there were blood and barefoot prints on the roof.

Matthew Grady Sandy testified that he was with both defendants the night of 14 May 1984 and they drank two cases of beer. The morning of the 15th, Sandy drove defendants to Northern High School. Defendant Torres was barefooted. Defendants called out: "Hey boy, come here" to Thurman; then Thurman and defendants disappeared between the cars. Sandy did not watch the fight. Sandy said that Defendant Torres was wearing very large skull head rings which stuck out "[a]s a brass knuckle would." Defendant Torres also had a BB pistol. Sandy heard Thurman yell, "Leave me alone, I can't take it anymore," and he heard glass shatter. Then defendants jumped into Sandy's car, and they drove away. They stopped at a store, and defendant Torres bought four cases of beer and a box of rings. Both defendants were covered in blood. On cross-examination Sandy said that he was testifying pursuant to a plea bargain agreement in which he would plead guilty to misdemeanor assault inflicting serious injury for which the State would recommend a two year suspended sentence.

When defendants were arrested, they both were wearing rings which were about the size of a quarter and were in the shape of skulls, eagles and pirate heads. The rings on defendant Torres' right hand were covered in blood.

Defendant Forsyth testified that the night of 14 May 1984 he, Sandy and defendant Torres stayed up all night drinking. When they went to Northern High School the morning of 15 May 1984, defendant Torres got out of the car to vomit. Then defendant Forsyth heard a noise, got out of the car and saw that defendant Torres and Thurman were fighting. He tried to break up the fight. On cross-examination defendant Forsyth said that before he went

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to Northern High School he assaulted someone at Southern High School and was charged with assault with a deadly weapon inflicting serious injury and entered a plea of guilty to simple assault.

Defendant Torres testified that at Northern High School he was vomiting in the parking lot when Thurman approached him. He hit Thurman, and Thurman hit him back. Then he got back in the car. He denied jumping onto the Honda Accord.

The trial judge submitted the possible verdicts of assault with a deadly weapon inflicting serious injury, and the lesser included offense of assault inflicting serious injury, and injury to personal property, a Honda automobile, as to each defendant. The jury found both defendants guilty of assault with a deadly weapon inflicting serious injury and defendant Torres guilty of injury to personal property. Defendants received the maximum sentences for the offenses. Defendants appeal.

Attorney General Thornburg by Assistant Attorney General Robert R. Reilly for the State.

Arthur Vann for defendant-appellant Forsyth.

R. Marie Sides for defendant-appellant Torres.

PARKER, Judge.

[1] In their first and second assignments of error defendants argue that the trial court abused its discretion and committed prejudicial error in denying their motions in limine which sought to prevent introduction into evidence of rings purchased by defendant Torres after the incident and in admitting the rings into evidence at trial. We disagree.

"Generally, a motion in limine seeks to secure in advance of trial the exclusion of prejudicial matter. . . . In those jurisdictions which recognize the motion . . . the uniform rule appears to be that the decision whether to grant the motion is addressed to the trial judge's discretion." *State v. Rouf*, 296 N.C. 623, 252 S.E. 2d 720 (1979).

In this case, we discern no prejudice resulting from the trial judge's failure to grant defendant's motion in limine. Additionally, defendants failed to object when the rings were introduced into evidence at trial. See, *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d

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311 (1976), holding that notwithstanding a pretrial motion to suppress objectionable evidence, the failure to object in apt time at trial to objectionable testimony results in a waiver of the objection so that admission of the evidence will not be reviewed on appeal. These assignments of error are overruled.

Next, defendants assert the trial court erred in permitting cross-examination of defendants concerning their prior convictions. Having failed to object to these questions at trial, defendants are precluded from raising the issue on appeal. Rule 10, Rules of Appellate Procedure.

[2] Next, defendant Forsyth contends that the trial court erred in allowing the prosecutor over defense objections to hold a pellet gun up to view to the jury during his closing arguments and to make occasional references to the gun when the gun had not been admitted into evidence. We agree the court erred in this regard, but we do not believe this error constituted prejudicial error.

Although it is well-established that "[a] prosecutor in a criminal case is entitled to argue vigorously all of the facts in evidence, any reasonable inference that can be drawn from those facts and the law that is relevant to the issues raised by the testimony," *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984), it is equally well-established that he may not argue facts not present in the record, *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), or facts not in evidence. *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984).

A review of the transcript reveals the jury was excused from the courtroom so the court could hear arguments and rule on defendant Forsyth's motion "to not have them [the State] put the gun in evidence." After argument, the court overruled the objection, and brought the jury back into the courtroom. The transcript reveals the following during examination of Akers:

Gun is marked State's Exhibit No. 1.

Mr. Stephens: It is a BB gun.

Court: It is a fake gun.

Q. Let me show you what has been marked previously State's Exhibit No. 1 and ask you if this looks in all respects like the weapon you saw that day?

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A. Yes, sir, it does.

Q. Can you describe the manner in which it was held or being used?

OBJECTION BY MR. VANN; OVERRULED.

Q. Can I go ahead?

Q. Yes, Sir.

A. It was pointed at me like a regular gun would be pointed at me.

At the close of the State's evidence, the following transpired:

Mr. Stephens: That is going to be the evidence for the State. I believe all the exhibits that we intended to introduce are in, and the State will rest.

Mr. Vann: Objection to No. 1.

Mr. Stephens: We never officially—we would not offer that.

Court: My notes show that No. 1 was not offered, therefore, it is not in evidence, and my notes indicate that the others were.

Because State's Exhibit No. 1, the gun, was neither offered nor admitted into evidence, we believe it was error to allow the prosecutor to present this gun to the jury during his closing arguments. However, we do not believe that this constituted prejudicial error because defendant was charged with using "metal, raised-design rings on his fingers, deadly weapons, to assault and inflict serious injury. . . ." Defendant Forsyth was not charged with assault through the use of a firearm. In our view, whether defendant Forsyth possessed a firearm during this transaction would not affect the jury's deliberations on whether defendant Forsyth assaulted Thurman with deadly metal rings. The assignment of error is overruled.

[3] In defendants' fifth assignment of error, defendant Forsyth contends that the trial court erred in entering judgment on the verdict for the reason that the evidence did not support a verdict that the rings worn at the time of the fight were deadly weapons. After the jury returned its verdict, defendant moved to set aside the verdict as contrary to the weight of the evidence; this motion

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was denied. This motion was in essence a motion for appropriate relief under G.S. 15A-1414(b)(2). A motion to set aside the verdict is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Jacobs*, 51 N.C. App. 324, 276 S.E. 2d 482 (1981); *State v. Watkins*, 45 N.C. App. 661, 263 S.E. 2d 846, cert. denied, 300 N.C. 561, 270 S.E. 2d 115 (1980). We find no such abuse and this assignment of error is overruled.

[4] Defendant Torres next assigns error to the trial judge's admonishment to defendant Torres' attorney: "Your comments, Mrs. Sides, your comments are not necessary. Keep them to yourself." Counsel for defendant had been improperly remarking on the witness' testimony, rather than asking a question, and the trial judge was properly exercising his control over the cross-examination of the witness.

[5] In their seventh assignment of error defendants argue that the trial judge erred in failing to consider and find as a factor in mitigation that defendants' mental condition significantly reduced their culpability because they had been drinking before the incident. Defendants did not, however, request that the trial judge find, as a factor in mitigation, that they were suffering from "a mental or physical condition that was insufficient to constitute a defense but significantly reduced [their] culpability for the offense." G.S. 15A-1340.4(a)(2)(d). The trial judge only has a duty to find a statutory mitigating factor that was not submitted by defendant when the evidence offered at the sentencing hearing in support of the factor in mitigation is both uncontradicted and manifestly credible. *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984). In addition to their evidence that they were intoxicated, defendants must also satisfy the trial judge by the preponderance of the evidence that their mental or physical condition, i.e., intoxication, significantly reduced their culpability for the offense. In describing his physical condition at the time of the incident, defendant Torres testified that he was "feeling sick already because [he] had been high like three days and didn't have much to eat." Defendant Forsyth testified that he was drunk and "high" and did not remember exactly what he was doing. There was no showing that defendants' condition reduced their culpability or that this evidence was manifestly credible. We hold that the trial

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judge did not err in failing to find that defendants' intoxication reduced their culpability.

[6] Finally, in the last assignment of error defendant Torres asserts that the trial judge erred in failing to find as a statutory mitigating factor that defendant Torres' immaturity or limited mental capacity significantly reduced his culpability. The basis for this assignment is defense counsel's statement to the court that defendant Torres was a "Willie M child" who never received treatment. However, there was no sworn testimony as to defendant Torres' condition and no showing that this condition reduced defendant Torres' culpability. On the authority of *Gardner, supra*, this assignment of error is overruled.

We have carefully considered all defendants' assignments of error and find

No error.

Judges JOHNSON and EAGLES concur.

CLAUDE WOODELL, EMPLOYEE, PLAINTIFF v. STARR DAVIS COMPANY,
EMPLOYER, AETNA CASUALTY & SURETY CO., CARRIER, DEFENDANTS

No. 8510IC68

(Filed 15 October 1985)

**1. Master and Servant § 68.1— asbestosis—exposure for thirty working days—
evidence sufficient**

The evidence in a workers' compensation claim for asbestosis was sufficient to support a finding or conclusion that plaintiff was injuriously exposed to asbestos for thirty working days or parts thereof while he was employed by defendant where plaintiff testified that in insulating new pipes he had to tear off old insulation, square it off, and retie it back in, boxes of asbestos containing pipe insulation were on the floor, the insulation crews tried to sweep the asbestos off the floor each day, there was not a single day plaintiff worked in the old plant that he was not exposed to asbestos, and defendant conceded that plaintiff worked in the old plant a minimum of thirty days. The Industrial Commission properly resolved an issue of credibility raised by conflicting evidence in plaintiff's favor. G.S. 97-57.

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2. Master and Servant § 68.1— asbestosis—determination of last injurious exposure—additional findings unnecessary

In a workers' compensation action for asbestosis, the Industrial Commission's findings adequately supported its determination that plaintiff was last injuriously exposed to the hazards of asbestos for the statutory period while in defendant's employ and findings regarding the days and times that plaintiff was involved in squaring up or tearing off old insulation in an old building, how much time was involved in working near insulation between the old and new buildings, and how much time was involved in the duct work in the new building were unnecessary. A claimant under G.S. 97-57 need not show that the conditions of employment caused or significantly contributed to the occupational disease.

3. Master and Servant § 68.1— asbestosis—exposure for two years within North Carolina—evidence not sufficient

The evidence was not sufficient in a workers' compensation claim for asbestosis to show that plaintiff was exposed to the inhalation of asbestos dust in his employment for a period of at least two years within North Carolina where plaintiff did not specify the location of much of his work in the insulation industry and affirmatively showed only four months' employment in North Carolina. G.S. 97-63.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission entered 4 September 1984. Heard in the Court of Appeals 29 August 1985.

Leonard T. Jernigan, Jr., for plaintiff appellee.

Brown & Johnson, by C. K. Brown, Jr., for defendant appellants.

BECTON, Judge.

I

Plaintiff, Claude Woodell, filed this Workers' Compensation asbestosis claim against defendant Starr Davis Company, an insulation contractor, on 29 April 1982. Defendant Aetna Casualty & Surety Company is the insurance carrier for Starr Davis. Woodell was employed by Starr Davis as a working foreman of an insulation crew from 3 June 1979 through 4 October 1979. Prior to that, Woodell had worked as an insulator since 1970 for several different contractors. The Deputy Commissioner who heard the case found that Woodell suffered from asbestosis with a 40% disability, and awarded Woodell 104 weeks of benefits pursuant to N.C. Gen. Stat. Sec. 97-61.6 (Supp. 1983). Defendants appealed

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to the North Carolina Industrial Commission (Commission) which, in an unanimous opinion and award, adopted the opinion and award of the Deputy Commissioner.

Defendants appeal to this Court, alleging that: (1) the evidence was insufficient to support the findings which showed that Woodell was exposed to the hazards of asbestos pursuant to N.C. Gen. Stat. Sec. 97-57 (1979); (2) the findings were inadequate to support the conclusion that Woodell was entitled to an award of compensation; and (3) Woodell was not exposed to asbestos for at least two years in the State of North Carolina as required by N.C. Gen. Stat. Sec. 97-63 (1979). We conclude that there was sufficient competent evidence to support the findings which showed that Woodell was exposed to asbestos for the statutory period, which findings were, in turn, sufficient to support the conclusion that Woodell was entitled to compensation. We do find, however, that the evidence adduced at the hearing was insufficient to enable the Commission to determine whether Woodell's injurious exposure was for two years within this State as required by G.S. Sec. 97-63, and the case is remanded for the taking of additional evidence on this point.

II

A

The Commission concluded that Woodell was injuriously exposed to asbestos while in Starr Davis' employment such that he was entitled to benefits under our Workers' Compensation Act. The critical findings of fact upon which the Commission based its conclusion are as follows:

1. Plaintiff was employed by the defendant-employer at the Federal Paper Board Plant in Riegelwood beginning June 3, 1979 through October 4, 1979. Plaintiff began as a working foreman in the old building overseeing the insulation of old pipes where they had been joined to new pipes running to the new building. Plaintiff's crew's job involved the replacement at these junctures of insulation which had been cut away by the pipe fitters in order to join the new pipes to the old pipes. Before installing the new insulation, which did not contain asbestos, plaintiff and his crew often had to square off or cut the edges even, or remove more of the old insulation which did contain asbestos.

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2. Since the pipe fitters did not clean up the old insulation which they had removed from the pipes and since there were boxes of old insulation located in the areas in which plaintiff worked, the air was filled with old insulation dust, especially when the crew would sweep each day. The ventilation was poor and the machinery in use stirred the dust.

3. During the time plaintiff was employed by the defendant employer plaintiff was injuriously exposed to the hazards of asbestos in excess of thirty (30) working days, or parts thereof, within four (4) consecutive calendar months.

4. After the employment with the defendant-employer plaintiff was unemployed for several months before becoming employed by Sneed, Inc. where he had no exposure to asbestos. However, in [sic] August 6, 1981 while so employed and as a result of his employment, plaintiff suffered an episode of heat exhaustion and tracheobronchitis. During the related hospitalization plaintiff was diagnosed by William F. Credle, Jr. M.D. as having a restrictive pulmonary disorder as a result of his contracting the occupational disease of asbestosis.

In order to be entitled to compensation on an asbestosis (or silicosis) claim, a claimant must meet the statutory requirements of both N.C. Gen. Stat. Sec. 97-57 (1979) and N.C. Gen. Stat. Sec. 97-63 (1979). *Pitman v. L.M. Carpenter & Associates*, 247 N.C. 63, 100 S.E. 2d 231 (1957) (silicosis). G.S. Sec. 97-57 provides, in pertinent part, that:

In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious;

....

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G.S. Sec. 97-63 provides:

Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than 10 years prior to the last exposure.

It is well-settled that the scope of review of our appellate courts in reviewing any decision of the Industrial Commission is limited to a twofold inquiry: whether there was competent evidence before the Commission to support its findings, and whether such findings support the legal conclusions. *Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). In making its findings, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Yelverton v. Kemp Furniture Co.*, 51 N.C. App. 675, 277 S.E. 2d 441 (1981). And the Commission's findings of fact, when supported by competent evidence, are conclusive on appeal even though there is evidence to support contrary findings. *Yelverton; Dowdy v. Fieldcrest Mills, Inc.*, 308 N.C. 701, 304 S.E. 2d 215 (1983), *reh'g denied*, --- N.C. ---, 311 S.E. 2d 590 (1984).

B

[1] The central challenge made by defendants on this appeal is that the evidence produced at the hearing does not support a finding or conclusion that Woodell was injuriously exposed to asbestos for thirty working days or parts thereof within the four months he was employed by Starr Davis, pursuant to G.S. 97-57. We do not agree.

In support of their position, the defendants point to evidence indicating that no tear-out work of old asbestos-containing insulation was done on the Riegelwood job, and that Starr Davis has not used asbestos-containing insulation products since 1971. Woodell, however, testified to the contrary, that in insulating the new pipes he had to "tear the old insulation off, square it off and retie it back in." He testified that when he worked in the old plant, boxes of asbestos-containing Kaylo pipe insulation were on the floor, and that the insulation crews tried to sweep the asbes-

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tos off the floor each day. Woodell testified there was not a single day he worked in the old plant that he was not exposed to asbestos. The defendants concede that Woodell worked in the old plant a minimum of thirty days. By defendants' own calculations, then, Woodell potentially sustained the statutory minimum exposure to asbestos.

In sum, conflicting evidence created a credibility issue for the Industrial Commission as to whether Woodell's exposure to asbestos while in Starr Davis' employ was of sufficient duration to meet the statutory minimum and entitle him to compensation. The Commission resolved this issue in Woodell's favor. This was entirely proper.

C

[2] The defendants' next contention is that the Commission's findings were inadequate to support the conclusion that Woodell was entitled to compensation. Specifically, the defendants argue that there are no findings with respect to the days and times that Woodell was involved in squaring up or tearing off old insulation in the old building, how much time was involved in working near insulation between the old and new buildings, and how much time was involved in the duct work in the new building. But the proper inquiry is not whether these additional findings could have been made from the evidence adduced; rather, it is whether the findings actually made are sufficient to enable us to determine the rights of the parties upon the matters in controversy. *Gaines v. L.D. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977) (Commission not required to make findings as to each fact presented by the evidence). In our opinion, the Commission's findings adequately support its determination that Woodell was last injuriously exposed to the hazards of asbestos for the statutory period while in Starr Davis' employ. See, e.g., *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E. 2d 359 (1983) (under G.S. Sec. 97-57, claimant need not show that the conditions of employment caused or significantly contributed to occupational disease).

D

[3] Defendants' final contention is that Woodell has not shown that he was exposed to the inhalation of asbestos dust in his employment for a period of at least two years within the State of

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North Carolina as required by G.S. Sec. 97-63. Here, we agree with the defendants.

Woodell testified that his first employment in the insulation business was with Brown and Root, for approximately two years beginning in 1970. He testified that he then worked for Daniels and Company as an insulation mechanic for approximately a year and a half, and subsequently went back to Brown and Root for approximately three years. Woodell testified he then worked for Daniels and another insulation company for a total of four years in South Carolina. According to Woodell, he went back to work for Starr Davis in 1979, first working in Columbia, South Carolina and then coming to work in Riegelwood, North Carolina, from June 1979 to October 1979. As this summary suggests, Woodell simply did not specify the location of much of his work in the insulation industry. Based on this evidence, Woodell has shown affirmatively only four months' employment in North Carolina, the time he worked in Riegelwood. This case must be remanded so that further evidence may be taken on this point.

III

In conclusion, this case must be remanded to the Commission for the taking of additional evidence on the location of Woodell's places of employment in the ten years prior to his last injurious exposure to asbestos. If the Commission determines that Woodell sustained a period of not less than two years of exposure to asbestos in this State in accordance with G.S. Sec. 97-63, then the award of benefits of the Commission must be affirmed. If the Commission finds that Woodell did not sustain the statutory minimum of exposure found in G.S. Sec. 97-63, then the opinion and award must be vacated.

Remanded for proceedings consistent with this opinion.

Judges WEBB and MARTIN concur.

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WILLIAM DOUGLAS VICK AND PATRICIA VICK v. DARRELL ST. CLAIR DAVIS

No. 8510SC207

(Filed 15 October 1985)

1. Appeal and Error § 6.9— default judgment as sanction—right of appeal

Although it is interlocutory, a party may appeal from an order imposing sanctions by striking his defense and entering judgment as to liability.

2. Rules of Civil Procedure § 37— failure to make discovery—default judgment—attorney's fees

In an action to recover damages arising out of an automobile accident, the trial court did not abuse its discretion in striking defendant's answer and entering default judgment against defendant on all of plaintiffs' claims because of defendant's refusal to comply with a court order to reveal the identity of a material witness. Nor did the trial court abuse its discretion in awarding plaintiffs attorney's fees in addition to the other sanctions imposed. G.S. 1A-1, Rule 37(b)(2)(C) and (E).

3. Rules of Civil Procedure § 37— failure to make discovery—default judgment—claim for punitive damages—no denial of due process

The court's entry of default judgment against defendant as a sanction for his refusal to reveal the name of a material witness did not deny defendant due process of law because plaintiffs have a claim for punitive damages since it would not incriminate defendant or cause punitive damages to be entered against him to furnish the name of the witness as ordered by the court.

Judge PHILLIPS concurring in part; dissenting in part.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 18 December 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 26 September 1985.

The defendant appeals an order of judgment by default as to all the plaintiffs' claims. The plaintiff appellees Mr. and Mrs. Vick were involved in a two-car collision with the defendant appellant Darrell St. Clair Davis on 17 March 1982. The plaintiffs sued the defendant for damages. On 30 March 1984, the plaintiffs took the defendant's deposition. At that time, in response to questions concerning the identity of a woman with whom the defendant claimed to have spent some part of the evening of 17 March 1982, the defendant stated that the woman's identity was "of no concern" and that "you are not going to get that out of me, even with a court order." On 18 October 1984, the trial court granted the plaintiffs' motion for an order to compel discovery, allowing the defendant 30 days in which to comply. When the defendant

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continued to refuse, the plaintiffs filed a motion for the imposition of sanctions.

At the 12 December 1984 hearing for the imposition of sanctions the defendant for the first time asserted that he did not know the woman's name. The trial court continued the hearing until the next morning to allow the defendant to obtain the information. The defendant testified that during that time he rode around the area of the witness' home, searched for a piece of paper with her name on it, and made several other unsuccessful efforts to discover her identity. At the hearing the next morning, the defendant continued to claim ignorance. The trial judge granted the plaintiffs' motion, striking the defendant's answer, entering default judgment against the defendant on all claims in the plaintiffs' complaint, and ordering the defendant to pay the plaintiffs' reasonable expenses, including attorney's fees, in the amount of \$1,300.00. The court ordered that there would be a trial on the issue of damages only. The defendant appealed.

Sanford, Adams, McCullough & Beard, by Cynthia Leigh Wittmer and Charles C. Meeker, for plaintiff appellees.

Moore, Ragsdale, Liggett, Ray & Foley, by George R. Ragsdale and Nancy Dail Fountain, for defendant appellant.

WEBB, Judge.

[1] Although it is interlocutory a party may appeal from an order imposing sanctions by striking his defense and entering judgment as to liability. See *Adair v. Adair*, 62 N.C. App. 493, 303 S.E. 2d 190, *disc. rev. denied*, 309 N.C. 319, 307 S.E. 2d 162 (1983).

[2] The defendant contends that the court abused its discretion in entering default judgment and in awarding attorney's fees. G.S. 1A-1, Rule 37(b) provides in part:

If a party . . . fails to obey an order to provide or permit discovery, . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or

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dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

. . . .

"The choice of sanctions under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E. 2d 793, 795 (1984).

In this case the trial judge found as facts that the defendant refused to identify a material witness, that the defendant was ordered by the court to identify this witness on 18 October 1984, that the defendant failed and refused to comply with that order, that the defendant "acted wilfully and in bad faith in failing to comply," and that the defendant "has had numerous opportunities to produce the evidence sought . . . which evidence was available to him, and has shown a . . . disregard of his known responsibilities." These findings of fact are clearly supported by the evidence. This places the sanctions ordered within the discretion of the court.

[3] The defendant also argues that because the plaintiffs have a claim for punitive damages the entry of default judgment deprives the defendant of due process of law. It would not incriminate the defendant or cause punitive damages to be entered against him to furnish the name of the person as ordered by the court. It was not error to strike the defendant's answer for his failure to furnish her name. See *Stone v. Martin*, 56 N.C. App. 473, 289 S.E. 2d 898, *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982). This assignment of error is overruled.

[2] In his third assignment of error the defendant argues that the trial court abused its discretion in awarding the plaintiffs attorney's fees in addition to the other sanctions imposed. In addition to striking the disobedient party's pleadings and entering default judgment, among other possible sanctions, the court is authorized to "require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." G.S. 1A-1, Rule 37(b)(2)(E). We have already determined

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that the trial court properly found the defendant's noncompliance unjustified. Therefore, the award of attorney's fees to the plaintiff was appropriate. The trial court awarded attorney's fees in the amount of \$1,300.00. In light of the fact that the plaintiffs' attorneys have spent eight and a half months attempting to obtain discovery from the defendant, we cannot say that this figure is unreasonable. This assignment of error is overruled.

Affirmed.

Judge JOHNSON concurs.

Judge PHILLIPS concurs in part; dissents in part.

Judge PHILLIPS concurring in part; dissenting in part.

Since his defiant refusal to answer questions properly put to him earlier in the proceeding unnecessarily burdened and extended the discovery process, the order requiring defendant to pay the charges of plaintiffs' attorneys is justified and I, too, vote to affirm that ruling. But the order striking defendant's defenses was not justified in my opinion and I dissent from the majority decision affirming it.

First, I do not agree that the defendant failed to obey an order of court as Rule 37(b) requires for sanctions to be imposed. The order involved directed defendant to answer the question concerning the woman's name, and he answered it by saying he did not know. Second, the dismissal of defendant's defense or case, the most drastic sanction that can be imposed in civil litigation, is disproportionate to defendant's offense, even if it should be conceded that he does know her name and thus did not properly answer the question when he said that he did not know the name of the woman he claims to have visited shortly before the collision occurred. The name of the woman referred to, if she exists, is not vital to plaintiffs' case; the evidence of defendant's neglect and lack of veracity is overwhelming and any evidence that she might have is collateral to the case and of little or no importance. Third, the evidence does not establish, at least in a clear and convincing way, that defendant is now lying and that his failure to name the woman is wilful. It seems much more likely to me that defendant's lie was when he first claimed that there

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was a woman; and that his initial defiance was the result of his bellicose and contumacious nature, rather than an effort to conceal important information. Finally, I do not believe that our law authorizes a trial judge to throw out a party's claim or defense on the grounds that the party's answer to a court directed question is false unless it is almost indisputable and irresistibly clear that it is false. In this case, as I read the evidence, defendant earlier implied by his braggadocio refusal to give the woman's name that he knew it; while later under oath he stated directly and positively that he did not know her name. Under the circumstances I do not believe that anyone could be convinced which answer was true and which was false. That the evidence may support a finding that the answer is false is not enough, in my opinion, to justify a trial judge dismissing a party's claims or defenses. To undo a paper writing, evidence that is clear, cogent and convincing to a jury is required; in my opinion the standard of proof for a trial judge undoing a party's lawsuit or defense should be at least that high.

**ROSEBORO FORD, INC. v. ALLEN CARROLL BASS AND UNITED STATES
LIABILITY INSURANCE COMPANY**

No. 854DC7

(Filed 15 October 1985)

1. Insurance § 70— purchase of car—title not transferred—purchaser had insurable interest

In an action by a car dealer against the purchaser of a car to whom title had not yet been transferred and the company providing collision insurance, the insurance company had a valid contract of insurance with the purchaser where liability insurance coverage was not involved, and the purchaser was the "owner" of the vehicle within the meaning of G.S. 20-4.01(26) because he had made a cash down payment of \$300 towards purchase of the car, the sales price and terms of sale had been agreed upon, he had agreed to pay the balance of the purchase price and to purchase the car from the dealer, and he had been given the immediate right of possession of the vehicle. As owner of the vehicle, the purchaser had an insurable interest in the subject matter to be insured. G.S. 25-2-509(3).

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2. Indemnity § 3; Contribution § 1; Rules of Civil Procedure § 13— crossclaim — incorrectly seeking contribution rather than indemnity—summary judgment properly denied

In an action by a car dealer against a purchaser to whom title had not yet been transferred and his collision insurance company, the trial court properly denied summary judgment in favor of the insurance company on the purchaser's crossclaim for contribution where the allegations made it clear that the crossclaim was for indemnity. Whether a permissible crossclaim has been stated is determined on the basis of the facts alleged in the crossclaim rather than on the basis of its legal conclusions.

3. Insurance § 74; Contracts § 14.2— automobile collision insurance—automobile dealer not third party beneficiary

An automobile dealer was not entitled to summary judgment against defendant insurance company in an action by the dealer against a company providing collision insurance and the purchaser of the car where title had not yet been transferred. The contract documents contained in the record showed that any right to performance under the insurance contract belonged to the purchaser as the potential insured and the bank as the designated loss payee; however, the record was silent as to whether any loan transaction was completed and did not reveal any circumstances indicating that the purchaser intended to give the dealer the benefit of the insurance company's promised performance.

APPEAL by defendant United States Liability Insurance Company from *Martin (James N.)*, Judge. Judgment entered 9 October 1984 in District Court, SAMPSON County. Heard in the Court of Appeals 23 August 1985.

This is a civil case in which plaintiff, Roseboro Ford, seeks to recover benefits pursuant to a collision insurance policy issued to defendant Bass by defendant United States Liability Insurance Company (Insurance Company).

The essential facts are:

On 26 February 1981 defendant Bass went to Roseboro Ford, Inc. to check into buying a 1979 Ford Thunderbird automobile. A salesman employed by Roseboro Ford turned the car over to Bass and allowed him to drive it home for purposes of test-driving the car. On 27 February 1981 Bass drove the car back to Roseboro Ford and made a cash down payment of \$300.00. Bass advised Roseboro Ford, through its agent, that he intended to purchase the car at an agreed price of \$4,600.00. Again, the salesman allowed Bass to take the car with him pending arrangement of satisfactory financing. A dealer tag was given to Bass by a Roseboro Ford salesman.

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That same day, Bass drove the car to Clinton to the Sampson Insurance Agency. He spoke with an insurance agent about obtaining insurance in connection with his purchasing the 1979 Ford Thunderbird. Bass made a cash payment for the purchase of a collision insurance policy. The insurance agent accepted the cash payment on behalf of defendant, Insurance Company, and issued a binder for collision insurance to Allen Carroll Bass as the potential insured. At this time the purchase price had not been paid in full to Roseboro Ford although the sales price and terms had been agreed upon. The parties stipulated that the insurance agent with Sampson Insurance Agency was a registered agent for Insurance Company and was acting within the course and scope of his agency relationship. Further, the parties stipulated that the insurance agent "had the authority to bind coverage" with Insurance Company.

On 28 February 1981, while operating the 1979 Ford Thunderbird, Bass was involved in a one car accident. The accident caused extensive damage to the car in the amount of \$3,750.00. At the time of the accident the automobile was owned as a dealer by Roseboro Ford, Inc., title not having been transferred to Bass. The binder issued on 27 February 1981 obligated the defendant, Insurance Company, to issue the collision insurance policy. The policy was never issued, however, and the binder was never cancelled or rescinded.

All parties filed motions for summary judgment. At the hearing on 23 July 1984, the Honorable James N. Martin granted summary judgment in favor of the plaintiff Roseboro Ford and denied the summary judgment motion of each defendant.

From a denial of its motion for summary judgment, the defendant Insurance Company appeals.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, by Dan M. Hartzog for plaintiff-appellee.

Allen, Hooten and Hodges, by John C. Archie and Thom. J. White for defendant-appellant.

EAGLES, Judge.

The issue here is whether United States Liability Insurance Company must provide collision coverage under the collision

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binder issued by its agent to defendant Bass for the damages caused to the 1979 Ford Thunderbird. We hold that it must.

[1] Defendant Insurance Company denies the validity of the contract of insurance with Bass, on the ground that Bass had no ownership interest in the car and therefore no insurable interest. We disagree. G.S. 20-4.01(26) defines "owner" as:

A person holding the legal title to a vehicle, or in the event a vehicle is the subject of . . . an agreement for the conditional sale . . . thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the . . . conditional vendee . . . said . . . conditional vendee . . . shall be deemed the owner. . . .

Our Supreme Court has held that "for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration" until transfer of legal title is effected as provided in G.S. 20-72(b). *Insurance Co. v. Hayes*, 276 N.C. 620, 640, 174 S.E. 2d 511, 524 (1970) (emphasis supplied). The general rule then, as between vendor and vendee, is that the vendee does not acquire "valid owner's liability insurance until legal title has been transferred or assigned" to the vendee by the vendor. *Ohio Casualty Insurance Co. v. Anderson*, 59 N.C. App. 621, 623, 298 S.E. 2d 56, 58 (1982), cert. denied, 307 N.C. 698, 301 S.E. 2d 101 (1983) (emphasis supplied).

The controversy here does not involve liability insurance coverage. Bass made a cash payment for the purchase of a collision insurance policy. Payment was accepted by Insurance Company's agent and a binder for collision insurance was issued naming Allen Carroll Bass as the potential insured. In issuing this binder to Bass, the Insurance Company provided coverage in addition to that described in G.S. 20-279.21(a), motor vehicle liability policy, and required under G.S. 20-279.21(b)(2). This additional coverage is voluntary and the liability of the carrier for coverage in addition to that required by the Act must be determined according to the terms and conditions of the binder. *Caison v. Insurance Co.*, 36 N.C. App. 173, 243 S.E. 2d 429 (1978). For these reasons we do not find *Hayes* or the general rule concerning liability insurance as stated in *Anderson* controlling on the collision insurance coverage here.

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Defendant Bass was the "owner" of the vehicle on the date of the accident, 28 February 1981, within the meaning of G.S. 20-4.01(26). He made a cash down payment of \$300.00 towards purchase of the car. The sales price and terms of sale had been agreed upon. He agreed to pay the balance of the purchase price and to purchase the car from Roseboro Ford. Further, Bass was given the immediate right of possession of the vehicle.

As owner of the vehicle as defined in G.S. 20-4.01(26), Bass had an insurable interest in the subject matter to be insured. As a general rule, "anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction." 7 Am. Jur. 2d, Automobile Insurance, Section 42 (1980). Pursuant to G.S. 25-2-509(3) risk of loss passes to the buyer upon receipt of the automobile. Bass had obligated himself by contract to comply with the terms of the agreement. Following the accident he could not have simply returned the damaged car and walked away.

[2] In the original complaint plaintiff named Bass and Insurance Company as party defendants. In Bass' answer, he instituted a cross-claim against defendant Insurance Company for contribution. All parties filed motions for summary judgment. Roseboro Ford filed a motion for summary judgment against both defendants. Defendant Bass filed a motion for summary judgment against Roseboro Ford. Defendant Insurance Company filed a motion for summary judgment against defendant Bass and Roseboro Ford. The trial court entered summary judgment in favor of the plaintiff and ruled that the motions filed on behalf of each defendant be denied. The trial court ordered that the plaintiff recover from the defendants the sum of \$3,750.00 as a result of the damages to the automobile and further specifically found that Insurance Company provided collision insurance to cover the damages.

Insurance Company contends in its brief that its motion for summary judgment as to Bass' cross-claim for contribution should have been allowed. Insurance Company argues that defendant Bass incorrectly designated his cross-claim as one for contribution. The right to contribution is statutory and is applicable only between joint tortfeasors. G.S. 1B-1; *Godfrey v. Tidewater Power Company*, 223 N.C. 647, 27 S.E. 2d 736 (1943). Insurance

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Company's argument is correct because the facts of this case do not support a cross-claim for contribution. However, whether a permissible cross-claim has been stated is determined on the basis of the facts alleged in the cross-claim rather than on the basis of its legal conclusions. *Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 159 S.E. 2d 362 (1968). From a review of the facts alleged in paragraph II of defendant Bass' cross-claim and paragraph 2 of his prayer for relief, it is clear that Bass' cross-claim is for indemnity and not contribution. His *legal conclusion* that the cross-claim was for contribution will not prevent a determination of the issue of indemnity. Accordingly, summary judgment in favor of Insurance Company and against defendant Bass was properly denied.

[3] The only theory of relief asserted by Roseboro Ford against Insurance Company is based on a third party beneficiary concept. The rights of an intended third party beneficiary to a contract are to be determined from an examination of the contract. The key question is whether the contract evidences an intent by the parties for the third party to receive a benefit that is enforceable in the courts. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970). The allegations in plaintiff's complaint do not establish a claim as an intended beneficiary of Insurance Company's contract with Bass. The contract documents contained in the record show that any right to performance under the insurance contract belonged to Bass as the potential insured and First Citizens Bank and Trust Company as the designated loss payee. The record, however, is silent as to whether any loan transaction was completed between Bass and the designated loss payee. Further, the record does not reveal any circumstances which indicate that Bass intended to give Roseboro Ford the benefit of the Insurance Company's promised performance. Since the record does not show that Roseboro Ford was the intended third party beneficiary of the contract between Insurance Company and Bass, we hold that Roseboro Ford is not entitled to summary judgment against defendant Insurance Company.

In summary, we affirm the trial court's finding that Insurance Company provided collision insurance to cover the damages to the 1979 Ford Thunderbird automobile. We also affirm the trial court's denial of Insurance Company's motion for summary judgment against defendant Bass. However, we reverse the trial court's granting summary judgment in favor of the plain-

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tiff against defendant Insurance Company because plaintiff Roseboro Ford was not the intended beneficiary of the contract between Insurance Company and defendant Bass. We hold that summary judgment should have been entered in favor of Insurance Company against Roseboro Ford. Defendant Bass has not appealed and the judgment entered against him in favor of Roseboro Ford is not before us. Accordingly, we remand this case for further proceedings on defendant Bass' cross-claim against defendant Insurance Company.

Affirmed in part and reversed in part and remanded.

Judges JOHNSON and PARKER concur.

BONNIE DAVIS MCGEE v. LARRY L. EUBANKS AND DEBORAH A. EUBANKS
v. CURTIS KEITH MCGEE

No. 8521SC50

(Filed 15 October 1985)

1. Attorneys at Law § 5.1— failure to remit funds to client

The evidence supported the trial court's findings that defendant attorney followed plaintiff client's instructions in disbursing funds received from a fire insurance settlement to plaintiff's son with the exception that defendant was to protect \$9,000 of the proceeds for plaintiff and pay such amount to her when the insurance draft was cashed but that plaintiff only received \$2,700. These findings supported the court's judgment in favor of plaintiff against defendant attorney for \$6,300 and its judgment for defendant in a third party action against plaintiff's son for \$6,300 plus \$2,000 punitive damages.

2. Attorneys at Law § 5.1— breach of disciplinary rule—no basis for civil liability

Even if defendant attorney breached DR9-102(A) of the Code of Professional Responsibility by failing to deposit client funds in one or more identifiable bank accounts separate from the attorney's business and professional accounts, that breach in and of itself would not be a basis for civil liability.

3. Public Officers § 9— conspiracy to defraud by notary—insufficient evidence

Absent allegations of malice or corruption, a notary may not be held liable for acts within her scope of duties. In this case, the evidence was insufficient to support a conclusion that defendant notary conspired to defraud plaintiff when defendant notarized a signature placed on a release form by plaintiff's son after plaintiff authorized her son to sign the release for her and authorized defendant to notarize such signature.

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APPEAL by plaintiff from *Saunders, Judge*. Judgment entered 28 September 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 28 August 1985.

Plaintiff, Bonnie Davis McGee (hereinafter Ms. McGee), instituted this action 27 May 1983 by filing her complaint alleging that defendants, attorney Larry L. Eubanks and his wife, Deborah A. Eubanks, conspired to defraud her of \$39,550 in proceeds from the settlement of a fire insurance claim. Defendants denied any conspiracy to defraud plaintiff. By way of a third party complaint, defendants named Curtis Keith McGee as a third party defendant on the grounds that he acted as agent for plaintiff and wrongfully converted proceeds from the settlement of the fire insurance claim.

On 27 June 1982, certain real property owned by Ms. McGee was destroyed by fire. Defendant Larry Eubanks was retained to represent plaintiff to procure a settlement of the fire insurance claim. Prior to the settlement of the fire insurance claim, plaintiff orally agreed with third party defendant, Curtis Keith McGee, her son, to purchase a house owned by Curtis McGee for \$20,000 to be paid from the proceeds of the insurance settlement.

On 4 November 1982, the insurance claim release arrived in the office of Larry Eubanks. Deborah A. Eubanks, a notary public, was employed by her husband as a legal secretary. When the release form arrived in the office, Deborah A. Eubanks instructed Curtis Keith McGee to procure his mother's signature on the release. Approximately ten minutes later Curtis Keith McGee returned with a signature on the release form. Deborah A. Eubanks called Ms. McGee informing her that Curtis had not done as she requested and that Ms. McGee was to personally sign the release. Instead of signing the release, Ms. McGee authorized her son to sign the release for her and authorized Deborah A. Eubanks to notarize the signature. After the release was signed and the signature notarized per Ms. McGee's authorization, Curtis Keith McGee delivered the release to the insurance company.

On 5 November 1982, a fire loss payment draft for \$39,550 arrived at Larry Eubanks' office made payable to Ms. McGee and her attorney, Larry Eubanks. Since the draft could not be cashed for ten days, Curtis McGee presented a third party, Garvie Welborn, who purportedly would cash the check immediately. How-

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ever, Mr. Welborn had only \$12,000 in cash, \$27,550 less than the face amount of the draft.

Larry Eubanks telephoned Ms. McGee and informed her of the arrangement Curtis was proposing. Larry Eubanks informed Ms. McGee that Mr. Welborn did not have sufficient funds to cash the draft for its face amount. Nevertheless, she authorized her son to place her signature on the check. The only person to receive cash from Garvie Welborn on 5 November 1982 was Curtis McGee, who received the entire \$12,000. Later, when the draft cleared the bank, Mr. Welborn paid to Larry Eubanks attorney fees of \$3,000, and paid the balance to Curtis McGee. When Ms. McGee did not receive any money after the draft was cashed, she made demand on attorney Eubanks, asserting that she had previously revoked her agreement with Curtis to purchase the house. Larry Eubanks informed her that the money was gone, but she would receive the \$9,000 he had expressly agreed to protect for her. Thereafter, at the instruction of Larry Eubanks, \$2,700 was paid by Curtis McGee to his mother, leaving a balance of \$6,300 due her pursuant to Larry Eubanks' promise to see that she received \$9,000.

The trial court awarded Ms. McGee a judgment against Larry Eubanks in the principal sum of \$6,300, plus interest of 8 percent from 9 November 1982. Ms. McGee's action against Deborah Eubanks was dismissed. On the third party complaint the court awarded compensatory damages of \$6,300, plus interest of 8 percent from 9 November 1982, along with punitive damages in the sum of \$2,000. From the judgment of the trial court, plaintiff appeals.

Randolph and Tamer, by Clyde C. Randolph, Jr., for plaintiff appellant.

Wilson, Degraw, Johnson & Miller, by Dan S. Johnson, for defendants appellees.

JOHNSON, Judge.

[1] The questions presented by appellant primarily focus on whether the trial court's findings of fact were supported by the evidence presented. Ms. McGee's additional assignments of error raise the question of whether attorney Eubanks may be held

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strictly liable for a breach of DR9-102 of the Code of Professional Responsibility.

The pertinent findings of fact to which Ms. McGee takes exception are as follows:

17. On November 5, 1982, the plaintiff and the defendant Larry Eubanks, expected that the following events would take place upon authorization, and the plaintiff's authorization was granted on these conditions.

(a) That Eubanks would 'protect the \$9,000.00' and pay it to the plaintiff when the draft was cashed by Welborn;

(b) That Eubanks would receive his \$3,000.00 when the draft was cashed;

(c) [T]he sum of \$7,500 would represent a loan to defendant McGee from the plaintiff McGee;

(d) That \$7,500 sum would be used to repay Phillip McGee for his interest in the Belews Creek Road homeplace of the plaintiff arising out of the June transaction with his brother;

(e) That the third party defendant [Curtis Keith McGee] would receive from Garvie Welborn, when the draft was cashed, the sum of \$20,000.00 representing the purchase price, down payment on McGee's house arising out of his agreement with his mother for the sale of his house.

In the review of an appeal from a trial court judgment without a jury, we are bound by several salient principles. The cardinal principle is that ". . . the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975). Ms. McGee asserts that there is insufficient evidence to support the trial court's findings of fact. "The findings of the court will not be reviewed if there is *any* competent evidence in the record to support them." *Wachovia Bank & Trust Co. v. Bounous*, 53 N.C. App. 700, 706, 281 S.E. 2d 712, 715 (1981) (emphasis added).

In the case *sub judice* the evidence supporting finding of fact 17 tended to show that Ms. McGee authorized attorney Larry

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Eubanks to distribute the insurance funds. In most instances where Ms. McGee has assigned error to the court's findings of fact it was her own testimony which supported the court's findings. Ms. McGee testified that ". . . at that time, he [Larry L. Eubanks] was to have his \$3,000.00, send me a check for nine, and give Keith the twenty for the house plus seven thousand—it was a little over seven thousand he was to give Keith—and Keith was to owe me." There are several other excerpts from Ms. McGee's testimony which support the court's finding that Larry Eubanks was to protect \$9,000 for her. Larry Eubanks also testified that Ms. McGee instructed him to keep her \$9,000, whereupon he agreed to "protect the \$9,000" on her behalf. We conclude there is ample evidence in the record to support the court's finding that at Ms. McGee's request attorney Eubanks was to "protect" \$9,000 for her.

The evidence in the record supports the court's findings that it was Curtis Keith McGee who received \$12,000 the day the draft was cashed. Garvie Welborn's testimony along with testimony by Larry Eubanks conclusively established this fact.

The court found that Ms. McGee authorized the draft to be cashed with the knowledge that Garvie Welborn had insufficient funds to tender the full amount of the draft; therefore, Curtis Keith McGee would receive the cash that Mr. Welborn tendered. These findings are borne out by Larry Eubanks' testimony with respect to a telephone conversation between him and Ms. McGee about the state of Ms. McGee's affairs.

Ms. McGee also excepted to the court's finding of fact that the sum of \$7,500 would represent a loan to Curtis Keith McGee. As pointed out earlier, Ms. McGee testified that "Keith was to owe me," which supports the trial court's finding.

Testimony with respect to Ms. McGee's purported revocation of authority for the draft to be cashed by Welborn tends to show that the insurance draft had already cleared. Again, Ms. McGee testified that she spoke with Larry Eubanks concerning the transaction "*either before the draft cleared or the day.*" (Emphasis added.) However, Larry Eubanks' testimony specifically places the conversation with Ms. McGee in the evening after the draft was cashed. Thus, the trial court could reasonably find as a fact

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that the authorization was still in effect at the time the draft was cashed.

[2] Plaintiff's next assignment of error is that the trial court erred by not concluding as a matter of law that Larry Eubanks violated DR9-102 of the Code of Professional Responsibility of the North Carolina State Bar. The relevant portion of DR9-102(A) provides "[a]ll funds of clients . . . other than advances for costs and expenses shall be deposited in one or more identifiable bank accounts" separate from the attorney's business and personal accounts. DR9-102(A), Code of Professional Responsibility. However, the preliminary statement to the Code states "[t]he code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, *nor does it undertake to define standards for civil liability of lawyers for professional conduct.*" Code of Professional Responsibility, Preliminary Statement (emphasis added). Thus, assuming *arguendo* that Larry Eubanks had breached DR9-102 of the Code of Professional Responsibility of the North Carolina State Bar, that breach in and of itself would not be a basis for civil liability. ". . . [D]isciplinary rules are derived from ethical rather than legal principles. . . . [a]nd most rules of law are derived ultimately from ethical principles. But before an ethical principle can serve as a satisfactory source for legal rules, it must be accepted as a *legal principle.*" Patterson, *A Preliminary Rationalization of The Law of Legal Ethics*, 57 N.C. L. Rev. 519, 525 (1979). Accordingly, we conclude that the trial court did not err in refusing to find as a matter of law that Larry Eubanks could be held liable for a violation of the disciplinary rules.

[3] Ms. McGee's next contention is that the trial court erred by dismissing her claim against defendant Deborah A. Eubanks. The trial court made findings of fact that Deborah Eubanks advised her husband Larry Eubanks that Curtis Keith McGee had not procured Ms. McGee's signature on the release. Upon being informed of this, Ms. McGee authorized Deborah A. Eubanks to notarize the release form. In North Carolina a notary public is a public officer. *Nelson v. Comer*, 21 N.C. App. 636, 205 S.E. 2d 537 (1974). Absent allegations of malice or corruption a notary may not be held liable for acts within her scope of duties. *Id.* Though there were allegations of fraud, there was, as a matter of law, insufficient evidence to support a conclusion that Ms. Eubanks con-

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spired to defraud Ms. McGee. We conclude that the evidence supports the trial court's findings and the findings support the judgment against defendant.

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM RUSSELL STALLINGS

No. 8411SC1164

(Filed 15 October 1985)

1. Criminal Law § 73.2— delivery of cocaine—statements made in defendant's presence—admissible

There was no error in a prosecution for possession and delivery of cocaine in admitting statements not made by defendant regarding efforts to find cocaine where the testimony was not offered to prove the truth of the matters asserted but to show defendant's knowledge of his companions' plans or to explain subsequent conduct.

2. Criminal Law § 113— possession and delivery of cocaine—court's summary of evidence—no prejudicial error

There was no prejudicial error in the trial court's summary of the evidence in a prosecution for possession of cocaine with intent to sell or deliver, sale or delivery of cocaine and conspiracy to sell or deliver cocaine where the court inaccurately or incompletely summarized the evidence by stating that defendant was introduced to an SBI agent, that a third party told the agent that he and defendant would go get the cocaine and that they would take a cut of the cocaine, and when it failed to summarize the evidence as to defendant's hearing disability and as to the stereo in the mobile home being played loudly. The misstatements or omissions were not so prejudicial as to require a new trial since defendant was convicted only of possession and delivery of cocaine and was acquitted of all other charges; moreover, the court expressly instructed the jurors that they were to consider all the evidence, to rely upon their recollection of the evidence and to disregard any statement by the court which differed from their recollection.

3. Criminal Law § 142.3— possession and delivery of cocaine—requirement that defendant repay SBI \$600 used to buy drugs

The trial court did not err by requiring as a condition of a suspended sentence that a defendant convicted of possession and delivery of cocaine pay the \$600 expended by the SBI to buy drugs as restitution. Money expended and not recovered by undercover SBI agents making a buy to obtain

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evidence necessary to an arrest for illicit drug operations is a particular damage or loss and not part of the agency's normal operating costs. G.S. 15A-1343(d).

Judge JOHNSON dissenting in part and concurring in part.

APPEAL by defendant from *Martin (John C.)*, Judge. Judgment entered 14 June 1984 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 23 August 1985.

Defendant was charged in bills of indictment with possession of cocaine with intent to sell or deliver, with sale or delivery of cocaine, and with conspiracy to sell or deliver cocaine. He was convicted of possession and delivery of cocaine and was acquitted of all other charges. He received a three year sentence, which was suspended on condition that, *inter alia*, he serve a six month active term and pay \$600 restitution to the State Bureau of Investigation (SBI) Special Drug Fund.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Dennis P. Myers, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

EAGLES, Judge.

The State's evidence consisted primarily of the testimony of Rod A. Broadwell, a Special Agent with the SBI. Broadwell testified that he went with Ray Perry and a confidential informant to a mobile home shared by Rickie Williams and defendant. Upon entering the house with his two companions, Broadwell was introduced to Williams. Broadwell also met defendant. In the living room in the presence of defendant, Broadwell and the confidential informant, Perry asked Williams to get some cocaine. Williams agreed to attempt to get some cocaine. Williams and Broadwell left the mobile home with the intention of obtaining cocaine, but were unsuccessful. Upon returning, Williams called defendant and Broadwell into a rear bedroom, where he told Broadwell to give him \$600 and that he and defendant were going to get the cocaine. Williams also told defendant, "I want you to drive, Russell, and if the police stops [sic] us I'll get out and run with the cocaine." Defendant agreed to drive. Williams and defendant returned to the mobile home a short time later. Defendant took a

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clear plastic zip lock bag containing a white powder substance, subsequently analyzed as cocaine, from his left coat pocket and handed it to Broadwell.

Defendant testified that he had no conversation with Broadwell; that he did not hear any conversation between Broadwell and Williams; that he had a hearing disability, having had three operations performed on his left ear; that Williams awakened him that night and asked him to drive Williams someplace because Williams was drunk; that Williams, nevertheless, drove the vehicle as defendant went back to sleep in the vehicle; that when they returned to their home, Williams instructed defendant to carry the plastic bag into the house; that he put the bag on the table; and that Broadwell picked up the bag from the table. Defendant's father corroborated defendant's testimony as to his hearing problems.

[1] Defendant first contends that the court erred in admitting Broadwell's testimony as to the following statements made by Perry or Williams: (1) Perry's request to Williams to get some cocaine and Williams' response that he would attempt to get some; (2) Williams' statement to Broadwell as they drove in search of cocaine that he "was going to this house to try to get some cocaine," and (3) Williams' statements in rear bedroom (a) to Broadwell requesting \$600 to purchase some cocaine, "that him (Williams) and Russell Stallings (defendant) were going to take (Broadwell's) car and go get it, and . . . that when he got back that he was going to take a toot out of the coke," and (b) to Williams asking defendant to drive "and if the police stops [sic] us I'll get out and run with the cocaine." Defendant contends that the above testimony was inadmissible hearsay. We disagree.

An assertion by any person other than the witness testifying is hearsay and inadmissible only if it is offered for the truth of the matter asserted; if the testimony is offered for a purpose other than proving the truth of the matter asserted, the testimony is admissible. 1 Brandis North Carolina Evidence, sec. 138 (1982). Here the testimony was not offered to prove the truth of the matters asserted, but to show defendant's knowledge of his companions' plans. *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977). Defendant's objections to the conversations at trial were grounded upon the failure of the State to lay a foundation as to

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whether defendant was present during these conversations. Once the State laid the foundation, defendant did not object to the subsequent admission of the conversations. Although Williams' statement to Broadwell as they rode in search of cocaine was not made in defendant's presence, it nevertheless was admissible to explain Broadwell's subsequent conduct. *State v. Tate*, 307 N.C. 242, 297 S.E. 2d 581 (1982).

[2] Defendant next assigns error to the court's instructions to the jury. He contends the court inaccurately or incompletely summarized the evidence: (1) when it stated Perry introduced both Williams and defendant to Broadwell, when Broadwell testified only that Perry introduced Williams to him; (2) when it stated Williams told Broadwell that he and defendant would go get the cocaine and that "they" would take a cut of the cocaine, when Broadwell testified that Williams said "he" would take a cut of cocaine; and (3) when it failed to summarize the evidence as to defendant's hearing disability and as to the stereo in the mobile home being played loudly. Since there was no objection at trial to the jury instructions, defendant urges us to find "plain error" pursuant to *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), and award him a new trial. We fail to perceive how these misstatements or omissions were so prejudicial as to require a new trial since defendant was convicted only of possession and delivery of cocaine and was acquitted of all other charges, including the conspiracy charge. Moreover, the court expressly instructed the jurors that they were to consider all the evidence, to rely upon their recollection of the evidence, and to disregard any statement by the court which differed from their recollection of the evidence.

[3] We find no merit in defendant's remaining contention that the court erred in requiring defendant to pay \$600 expended to buy drugs as restitution to the SBI Special Drug Fund. G.S. 15A-1343(d) provides in pertinent part:

As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. . . . As used herein, "restitution" shall mean compensation for damage or loss as could or

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dinarily be recovered by an aggrieved party in a civil action. . . . As used herein, "aggrieved party" shall include individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, State or local. *Provided, that no government agency shall benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs.* . . . Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State. (Emphasis added.)

Money expended and not recovered by undercover SBI agents making a buy to obtain evidence necessary to an arrest for illicit drug operations is a "particular damage or loss to it [the SBI]" and not part of the agency's "normal operating costs." G.S. 15A-1343(d). "Normal operating costs" would include the salaries and compensation of agents, acquisition and maintenance of vehicles and other equipment, and office and administrative expenses but not money used by undercover agents to purchase illicit drugs.

We are advertent to the opinion of the Fourth Circuit Court of Appeals in *Evans v. Garrison*, 657 F. 2d 64 (4th Cir. 1981), in which they construed G.S. 15A-1343(d) as not permitting a trial court as a condition of parole to order restitution of \$2,500 by each defendant to reimburse the SBI "for the expenses it had incurred in investigating the charges and obtaining the proof which led to the tender of the guilty pleas." *Id.* at 66. We believe that the cases are distinguishable on their facts. Here, the restitution ordered was \$600 actually spent to buy the illicit drugs at issue. In *Evans*, the funds in question were general investigation expenses.

In our judgment *Evans* is not sufficiently persuasive to mandate that money spent for drugs in this case not be repaid by the defendant.

For the reasons discussed, in the trial and sentencing here, we find

No error.

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Judge PARKER concurs.

Judge JOHNSON concurs in part and dissents in part.

Judge JOHNSON dissenting in part and concurring in part.

I dissent from the majority's conclusion that the \$600 ordered as restitution is not part of the SBI's "normal operating costs." The practice of the SBI (division within North Carolina Department of Justice) in making undercover buys of illicit drugs from suspected drug dealers is one of the most effective of several tools regularly used by the Department in its efforts to combat the illegal drug traffic within the State. The use of funds of the Department of Justice by undercover agents to purchase illicit drugs has become such a *continuing* and *ongoing* part of the Justice Department's efforts that the Department includes it as a line item within its general budget request. Since the early 1970's, the North Carolina General Assembly has appropriated funds to the Justice Department on an annual basis for special investigations by undercover agents expending funds to purchase illicit drugs. See Records of the North Carolina State Budget Office; Records of the Budget Office of the North Carolina Department of Justice. I believe that funds appropriated and used by undercover agents to purchase illicit drugs have become just as much a part of the "normal operating costs" of the Justice Department as are salaries and compensation of agents, acquisition and maintenance of equipment, and office and administrative expenses.

I agree with the reasoning and interpretation of the Fourth Circuit in *Evans v. Garrison*, 657 F. 2d 64 (1981). The majority seeks to make a distinction where there is no difference.

As to defendant's other assignments of error, I concur with the majority.

For the foregoing reasons, I vote to remand with instructions to modify the judgment by deleting the \$600 restitution requirement.

Rockwell v. Rockwell

JAMES C. ROCKWELL v. LORETTA ROCKWELL

No. 858DC90

(Filed 15 October 1985)

Army and Navy § 1; Husband and Wife § 11.2— separation agreement— designation of former wife as beneficiary of military retirement benefits—retroactivity of federal statute

Plaintiff husband has a present obligation to designate his former wife as beneficiary under his military retirement annuity plan pursuant to his agreement to do so in a separation agreement and a consent order, even though at the time the separation agreement and consent order were signed, federal statutes prohibited the designation of a former spouse as beneficiary of military retirement benefits, since an amendment to the federal statutes permitting designation of a former spouse as a beneficiary was intended to apply retroactively to existing contracts.

APPEAL by defendant from *Jones (Arnold O.)*, Judge. Order entered 27 September 1984 in District Court, WAYNE County. Heard in the Court of Appeals 30 August 1985.

The parties herein were married on 8 November 1947. In April 1963, plaintiff retired as a major from the United States Air Force with a survivor's benefit plan in full force. After their separation on 4 November 1974, defendant filed an alimony action against plaintiff. As consideration for defendant's dismissal of her alimony claim against him, plaintiff agreed in a separation agreement executed on 5 February 1976 to "convey unto the said Loretta Rockwell the permanent right to receive the said survivors benefit annuity, notwithstanding the fact that a divorce may hereafter be granted between the parties to this agreement."

On 27 September 1976 plaintiff filed for an absolute divorce. By consent order dated 6 August 1977, the parties agreed "[t]hat the plaintiff can proceed to obtain an uncontested divorce" and clarified the paragraph in their separation agreement concerning the annuity plan as follows:

(a) That James C. Rockwell would do all that he could by way of affirmative action in order to keep these benefits and entitlements available to Loretta Rockwell, and that he would refrain from doing anything which would take them away from her.

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(b) That if Loretta Rockwell should lose these benefits and entitlements as a result of James Rockwell doing anything which took away these rights, or failed to do anything which would assure her of these rights, then and in that event, a damage claim in behalf of Loretta Rockwell against the estate of James C. Rockwell would automatically arise. . . .

On the same day that this consent order was signed, plaintiff obtained a judgment of absolute divorce. In December 1978, plaintiff remarried and subsequently designated his new wife as beneficiary of his survivor's benefit annuity plan.

At the time the separation agreement and subsequent consent order were signed, the applicable federal statute prohibited designation of a former spouse as beneficiary of military retirement benefits. However, the federal statutes were amended in 1982, effective 1 February 1983, to permit designation of a former spouse as beneficiary of military retirement benefits. After amendment of the statute, defendant demanded that plaintiff designate her as beneficiary. Plaintiff refused, and defendant filed a complaint on 27 June 1984 in an independent action seeking specific performance of their separation agreement. In his answer, defendant moved to dismiss the action "in that an order has already been entered between the same parties . . . for the same claim alleged in the Complaint herein." The trial court dismissed plaintiff's complaint "since there was a prior Consent Order . . . as to these matters . . . involving the same claims alleged herein." Defendant did not appeal this dismissal.

On 14 August 1984, defendant filed a motion in the cause in the divorce action requesting "[t]hat plaintiff be ordered to specifically perform . . . by . . . designating defendant as beneficiary of his survivors benefits." From an order denying this motion, defendant appealed.

Langston, Langston and Duncan by Farris A. Duncan for plaintiff appellee.

Reid, Lewis and Deese by Reeny W. Deese for defendant appellant.

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PARKER, Judge.

In her first assignment of error, defendant contends the court erred in finding as fact that plaintiff had no obligation to presently designate defendant as beneficiary under the annuity plan. This more closely resembles a conclusion of law. A finding which is designated as a finding of fact, but in character is essentially a conclusion of law, will be treated as a conclusion of law on appeal, *Britt v. Britt*, 49 N.C. App. 463, 271 S.E. 2d 921 (1980), and is reviewable *de novo* upon appeal. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980).

The parties' contentions on this appeal may be summarized as follows. When plaintiff agreed in the separation agreement permanently to convey his annuity plan to defendant notwithstanding a subsequent divorce, and further agreed to clarify this requirement in the consent order, he did so knowing that the federal law at that time prohibited him from naming defendant as beneficiary after a divorce was obtained. Defendant's contention is that although she may have known that the applicable federal statute would prohibit such a designation, she nevertheless believed that plaintiff could validly contract to continue to designate her as beneficiary despite the federal statute.

The applicable federal statutes as amended clearly provide that plan members can voluntarily elect to designate a former spouse as beneficiary. 10 U.S.C. 1448(b)(3)(A) provides:

A person—

(i) who is a participant in the Plan and is providing coverage for a spouse or a spouse and child (even though there is no beneficiary currently eligible for such coverage), and

(ii) who has a former spouse who was not that person's former spouse when he became eligible to participate in the Plan.

may (subject to subparagraph (b)) elect to provide an annuity to that former spouse. Any such election terminates any previous coverage under the Plan and must be written, signed by the person, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment.

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The amended statute further states:

Nothing in this chapter authorizes any court to order any person to elect under Section 1448(b) of this title to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such election. 10 U.S.C. 1450(f)(4).

Plaintiff husband argues that because the provisions in the separation agreement and consent decree relative to retirement benefits were prohibited by statute at the time these documents were executed, they cannot be validated by amendment to the statute. We disagree.

While the general rule is that the law at the time of the making of the contract governs and a bargain illegal on account of a statute existing at the time is not rendered enforceable by subsequent repeal of the statute, a contrary result obtains when the repealing statute expressly provides for retroactive application to existing contracts, or if the court finds an implication to that effect. 6A Corbin, *Corbin on Contracts*, § 1532 (1962).

In our view, the clear implication of the amendments to Title X of the United States Code was to correct manifest injustice and unfairness in situations such as the one at bar. The short title for these 1982 amendments to Title X is Uniform Services Former Spouses' Protection Act. To adopt plaintiff's contention would eviscerate the language of the amendments. If Congress did not intend that the amendments would apply to contractual agreements entered into prior to the effective date of the statute, there would have been no need for Public Law 98-94 Section 941(1) which provided that the one year period from date of the decree of divorce, dissolution or annulment for electing, in 10 U.S.C. 1448(6)(3)(A), would begin to run on the date of the enactment of the Act, 24 September 1983, with respect to a person defined in that subsection. The reference to a spouse and dependent children vis-a-vis a former spouse obviously contemplates an existing marriage with the marriage to the former spouse having been dissolved prior to enactment of the amendments. Moreover, there is no language defining a former spouse as someone who becomes a former spouse subsequent to the effective date of the amendments.

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Having concluded that the statutory impediment to enforceability no longer exists, we must determine whether the separation agreement and consent decree are otherwise enforceable. The answer to this question is "yes." The separation agreement and consent decree represent a contract between the parties. *Cox v. Cox*, 43 N.C. App. 518, 259 S.E. 2d 400 (1979), *disc. rev. denied*, 299 N.C. 329 (1980). When the language of a contract is clear and unambiguous, the express language of the contract controls, not what either party thought the agreement to be. *Nash v. Yount*, 35 N.C. App. 661, 242 S.E. 2d 398, *cert. denied*, 295 N.C. 91, 244 S.E. 2d 259 (1978). Further, "a party to a contract may not, by asserting that he did not mean what he said, obtain an interpretation contrary to the express language of the contract." *Synder v. Freeman*, 300 N.C. 204, 215, 266 S.E. 2d 593, 600 (1980). The fact that plaintiff signed the documents thinking that the retirement benefit provisions were a legal sham and that he would never have to perform cannot now be used to contradict the intention expressed by the language in the documents he signed.

In view of the foregoing, we hold that under applicable North Carolina law, the separation agreement and consent decree constitute a voluntary agreement in writing to make the election.

Because we hold that the court erroneously concluded that plaintiff had no obligation to presently designate defendant as beneficiary under the survivor's benefits plan, we need not address the remaining assignments of error. The order appealed from is reversed and the case remanded for entry of an order consistent with this opinion.

Judges JOHNSON and EAGLES concur.

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MR. AND MRS. DENNY JOHNSON v. SMITH, SCOTT & ASSOCIATES, INC.

No. 8526DC86

(Filed 15 October 1985)

Vendor and Purchaser § 8—breach of contract to purchase real estate—return of earnest money—summary judgment for plaintiffs improper

The trial court erred by granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment in an action for the return of earnest money paid under a contract for the purchase and sale of real estate where the materials submitted by the parties showed that defendant's president called plaintiff on the morning designated as the closing date and asked if plaintiffs planned to close on that date; plaintiff told defendant that he could not close on that date because he and his wife had not sold their present house yet and that he had no intention of closing as long as his present house remained unsold; plaintiff admitted in a deposition that if the house had been ready for occupancy on the closing date and he had been tendered the deed to the property, there would have been no possibility that he and his wife could have closed on that date because they had not sold their present house and had not even applied for a loan; plaintiff further stated that his interest in the property ceased on the closing date, 30 June 1983, and that he did not respond to defendant's offer to close on 5 July 1983 because his present home remained unsold; and, although the house was not complete or ready for occupancy on 30 June 1983, it was apparently completed no later than 14 July 1983. Plaintiffs did not have grounds for rescinding the contract and recovering what they had paid under it because the delay in completion was at most two weeks, and because the contract did not expressly provide that time was of the essence nor was there anything in the contract or in the parties' actions to demonstrate their intent to make time of the essence; it was undisputed that plaintiffs suffered no damages from the delay. G.S. 1A-1, Rule 56(c).

APPEAL by defendant from *Johnston, Judge*. Judgment entered 27 November 1984 in MECKLENBURG County District Court. Heard in the Court of Appeals 29 August 1985.

Plaintiffs instituted this civil action seeking the return of \$2500 paid to defendant as earnest money under a contract for the purchase and sale of real estate. By written agreement entered on or about 21 February 1983, plaintiffs agreed to purchase and defendant agreed to sell a lot and a house thereon which was then under construction for the purchase price of \$146,000. The contract provided that \$2500 of the purchase price was to be paid in earnest money and contained the following provision regarding the disbursement of the earnest money:

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In the event . . . that any of the conditions hereto are not satisfied, or in the event of a breach of this contract by Seller, then the earnest money shall be returned to Buyer, but such return shall not affect any other remedies available to Buyer for such breach. In the event . . . Buyer breaches this contract, then the earnest money shall be forfeited.

Plaintiffs delivered the \$2500 in earnest money to defendant when they signed the contract.

The contract designated 30 June 1983 as the required closing date for the transaction but provided that plaintiffs could extend the closing date beyond 30 June 1983 by paying defendant interest for the extended time period at the rate of 13½% on the total purchase price less any binder amount. Under the contract, plaintiffs were to designate the place for the closing and the manner in which the deed to the property was to be made.

In their complaint, plaintiffs alleged that defendant was not in a position to close and deliver possession of the property on 30 June 1983 as required by the contract, and that they so informed defendant by letter dated 30 June 1983, a copy of which was attached to the complaint. In the letter, plaintiffs stated that the house was not completed; therefore, defendant was unable to comply with the terms of the contract and plaintiffs were entitled to a refund of their \$2500 deposit. Plaintiffs further alleged that after receiving their letter, defendant, through its president, John D. Scott, notified plaintiffs that it considered them to be in default of the contract because of their failure to notify defendant of a time and place for the closing and transfer of title and their failure to exercise their extension options in accordance with the contract.

Defendant filed an answer and counterclaim in which it denied that it was unable to deliver possession on 30 June 1983 and alleged that the house was substantially complete on that date, that plaintiffs were estopped from recovery, and that plaintiffs were in breach of the contract in several respects. Specifically, defendant alleged that plaintiffs were in breach of the contract because they (1) failed to designate the place of the closing or the manner in which the deed was to be made out as required by the contract, (2) advised defendant on 30 June 1983 that they had no intention of closing as long as their present home remained un-

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sold and that they did not wish to extend the closing date, and (3) failed to respond to an offer made by defendant on 1 July 1983 to close on 5 July 1983 when the house was completed. Defendant asserted as its counterclaim that it was entitled to retain the \$2500 earnest money as liquidated damages because of plaintiffs' breach of the contract.

Both parties moved for summary judgment and submitted documents in support thereof. By order entered 27 November 1984, the trial court denied defendant's motion and granted summary judgment in favor of plaintiffs. Defendant appealed.

Jones, Hewson & Woolard, by R. G. Spratt, III, H. C. Hewson, and Hunter M. Jones, for plaintiffs.

Berry, Hogewood, Edwards & Freeman, P.A., by Dean Gibson, for defendant.

WELLS, Judge.

Defendant contends the trial court erred in denying its motion for summary judgment and in granting summary judgment for plaintiffs. N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure permits the granting of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

The materials submitted by the parties for the court's consideration in ruling on the motions for summary judgment show the following: On the morning of 30 June 1983, defendant's president, John D. Scott, called plaintiff Denny D. Johnson and asked him if he planned to close on that date. Johnson told Scott that he could not close on that date because he and his wife had not sold their present home yet and that he had no intention of closing as long as his present home remained unsold. In a deposition taken prior to the hearing on the motions, Johnson admitted that if the house had been ready for occupancy on 30 June 1983 and he had been tendered the deed to the property, there would have been no possibility that he and his wife could have closed on that date because they had not sold their present home and had not even applied for a loan which they had to obtain in order to purchase

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the property. He further stated that his interest in the property ceased on 30 June 1983 and that he did not respond to defendant's offer to close on 5 July 1983 because his present home remained unsold. The exchange of letters between the parties in which each declared the other to be in default of the contract occurred after the conversation between Johnson and Scott on the morning of 30 June 1983.

The forecast of the evidence presented by the parties further shows that although the house in question was not complete nor ready for occupancy on 30 June 1983, it was apparently completed no later than 14 July 1983 on which date a certificate of compliance from the county director of building standards and code enforcement was issued for the property; and that plaintiffs were not damaged by the delay in completion.

Although plaintiffs argue otherwise in their brief, what they have attempted is to rescind the contract. A rescission or cancellation of a contract is an abrogation or undoing of the contract from its beginning and necessarily involves the refusal of a party to be further bound by it. *See Black's Law Dictionary* 1174 (5th ed. 1979); *Brannock v. Fletcher*, 271 N.C. 65, 155 S.E. 2d 532 (1967). Rescission does not merely terminate the contract so as to release the parties from further obligations to each other; rather, it abrogates the contract from its beginning and restores the parties to the position they would have been in had the contract not been made. *Id.* The Supreme Court has indicated that upon the breach of a contract for the purchase and sale of real estate by the seller, the buyer has the following remedies available to him, among others: (1) the buyer may sue at law for damages for the breach; (2) he may sue in equity and seek specific performance; or (3) he may abandon and thereby rescind the contract and recover what he has paid. *Id.* Plaintiffs apparently considered defendant to be in breach of the contract because of its alleged inability to close and deliver possession of the property on 30 June 1983 as required by the contract and elected as their remedy for the breach to rescind the contract and recover what they had paid.

As enunciated by our Supreme Court in *Childress v. Trading Post*, 247 N.C. 150, 100 S.E. 2d 391 (1957), however: "Not every breach of a contract justifies a cancellation and rescission. The breach must be so material as in effect to defeat the very terms

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of the contract." In *Childress*, the Supreme Court concluded that a delay of two months in completion of a dwelling did not justify cancellation and rescission of the contract for the purchase and sale of the real estate where time was not of the essence. The Court further stated:

As a general rule, time is not of the essence of a building or construction contract, in the absence of a provision in the contract making it such. Failure to complete the work within the specified time does not *ipso facto* terminate the contract, but only subjects the contractor to damages for the delay.

Id. See also *Douglass v. Brooks*, 242 N.C. 178, 87 S.E. 2d 258 (1955) (in the absence of special circumstances, time is not of the essence of a contract for the purchase and sale of real estate).

We find *Childress* controlling in the present case. The contract here does not expressly provide that time is of the essence, nor do we find anything in the contract or in the parties' actions which demonstrate their intent to make time of the essence. Since time was not of the essence and the delay in completion was at most two weeks, plaintiffs did not have grounds for rescinding the contract and recovering what they had paid under it. See *Childress, supra*. Plaintiffs were entitled to recover for any damages resulting from the delay, *id.*; however, it is undisputed that plaintiffs suffered no such damages.

Moreover, the forecast of the evidence clearly shows that plaintiffs were in breach of the contract as alleged by defendant, and that they forfeited their earnest money as a result. We reject plaintiffs' argument that the provision in the contract regarding the forfeiture of the earnest money amounts to an illegal penalty. It has long been the rule in this State that where a buyer refuses or becomes unable to comply with his contract to purchase, he is not entitled to recover the amount thus far paid by him pursuant to the contract. See *Scott v. Foppe*, 247 N.C. 67, 100 S.E. 2d 238 (1957); *Walker v. Weaver*, 23 N.C. App. 654, 209 S.E. 2d 537 (1974). Furthermore, the forfeiture provision is in the nature of a provision for liquidated damages. See 77 Am. Jur. 2d, Vendor and Purchaser, § 500, p. 626. No evidence has been forecast which indicates that the amount forfeited pursuant to the provision is unjust, oppressive, or disproportionate to the damages that would result, or did in fact result, from the breach of the contract;

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therefore, the provision should be upheld. See *Cooperative Assn. v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923).

We conclude that the forecast of the evidence shows that there is no genuine issue as to any material fact herein and that defendant is entitled as a matter of law to retain the \$2500 earnest money. Accordingly, we hold that the trial court erred in granting summary judgment for plaintiffs and in denying defendant's motion for summary judgment. We therefore reverse the judgment entered and remand this cause to the trial court for the entry of summary judgment in favor of defendant.

Reversed and remanded.

Judges WHICHARD and PHILLIPS concur.

SOUTH CAROLINA INSURANCE COMPANY v. SOUTHEASTERN PAINTING CO., INC., H. ANGELO & COMPANY, INC., THE HANOVER INSURANCE COMPANY, AND INSURANCE COMPANY OF NORTH AMERICA

No. 8510SC111

(Filed 15 October 1985)

1. Appeal and Error § 26— exception to the judgment

An exception to the judgment raises only two questions of law: (1) whether the facts found support the conclusions of law and the judgment, and (2) whether error of law appears on the face of the record.

2. Insurance § 149— general liability insurance—damage to windows during sandblasting—exclusion from coverage

A subcontractor who sandblasted military barracks buildings had "care, custody or control" of barracks windows within the meaning of a general liability insurance policy provision which excluded coverage for damage to "property in the care, custody or control of the insured" where the subcontractor had a duty under the primary contract and the subcontract to protect windows during sandblasting. Therefore, the insurer was not liable for damage to barracks windows caused by the insured subcontractor's failure adequately to protect the windows during sandblasting operations.

APPEAL by defendant, H. Angelo & Company, Inc., from *Bailey, Judge*. Judgment entered 24 September 1984. Heard in the Court of Appeals 18 September 1985.

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This is a declaratory judgment action brought by South Carolina Insurance Company (South Carolina) seeking a declaration of the rights and liabilities of the parties under a liability insurance policy it issued to defendant Southeastern Painting Company (Southeastern). South Carolina alleged that the exclusion section of its policy precluded coverage for damage done to certain barracks windows as the result of Southeastern's alleged failure to adequately protect the windows during sandblasting operations pursuant to a subcontract with defendant H. Angelo and Company, Inc. (Angelo). Southeastern failed to file an answer to the complaint and a default judgment was entered against it on 13 April 1984. Angelo filed an answer and counterclaim against South Carolina requesting reimbursement of the sums it had paid, as general contractor for the damaged barracks windows. Defendant Insurance Company of North America (INA) filed an answer requesting dismissal of the action against it and entry of a judgment declaring South Carolina's duty to provide coverage under its liability insurance policy issued to Southeastern. Defendant Hanover Insurance Company (Hanover) filed an answer, a counterclaim against South Carolina and a cross-claim against all other defendants seeking declaratory relief that coverage for the damage done to the barracks windows was excluded under the exclusion section of its liability insurance policy issued to Southeastern. South Carolina filed an answer to Hanover's counterclaim. INA filed an answer to Hanover's cross-claim seeking declaratory relief that Hanover's policy provided coverage for the damaged windows. Angelo filed an answer to Hanover's cross-claim and voluntarily dismissed its counterclaim against South Carolina.

The essential facts are:

On 9 April 1980 South Carolina issued to Southeastern a comprehensive general liability insurance policy with effective dates from 9 April 1980 to 9 April 1981. On 9 April 1981 Hanover issued to Southeastern a comprehensive general liability insurance policy with effective dates from 9 April 1981 to 9 April 1982. On 30 September 1980 Angelo entered into a contract with the United States government to paint the exteriors of several barracks at Fort Bragg. On 4 December 1980 Angelo entered into a subcontract with Southeastern whereby Southeastern would provide the

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materials and labor to prepare, protect, sandblast and clean up the barracks.

While Southeastern was performing the work under its subcontract, the glass windows in fifteen barracks buildings were damaged. Angelo was required under its contract with the United States government to replace all of the damaged and sandblasted windows. The cost to Angelo in replacing the windows and repairing the damages was \$54,473.45.

On 3 December 1982 Angelo filed suit against Southeastern, Hanover, Employers Insurance of Wausau (Wausau) and INA in which it alleged that Southeastern negligently damaged the windows during its sandblasting operations by failing to adequately protect the windows in breach of its subcontract with Angelo. Further, Angelo alleged that defendants Wausau and Hanover provided coverage for the period during which Southeastern was sandblasting the barracks under its subcontract. Southeastern refused to correct the damage and Hanover and Wausau refused to pay Angelo for the sums it expended in replacing the glass windows. Angelo also alleged in its complaint that INA issued a general liability insurance policy to Angelo affording coverage for all operations under its contract with the United States government. Angelo filed a claim for reimbursement with INA who also denied liability to Angelo and refused to reimburse it for the \$54,473.45. In this underlying action Angelo seeks damages from Southeastern, Hanover, Wausau and INA.

In the action filed by South Carolina, South Carolina and Hanover sought judicial determination of the extent, if any, of their respective obligations under their policies with Southeastern to cover the damages caused by Southeastern's alleged negligence. South Carolina took a voluntary dismissal as to defendant Wausau. At the hearing to determine the rights and liabilities of the parties as a matter of law under the insurance contracts issued by Hanover and South Carolina, the trial court concluded that neither South Carolina nor Hanover provided any coverage for the damages allegedly caused by Southeastern and that neither South Carolina nor Hanover had any obligation to defend Southeastern or satisfy any judgment rendered against Southeastern.

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Defendant Angelo excepted to the signing of the judgment, including the findings of fact and conclusions of law, and appealed. By motion of H. Angelo and Company and order of this court dated 4 October 1985, the appeal as to appellee Hanover was dismissed.

Richard B. Conely, for plaintiff-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, by Dan M. Hartzog, for defendant-appellee, The Hanover Insurance Company.

McCoy, Weaver, Wiggins, Cleveland and Raper, by L. Stacy Weaver, Jr., for defendant-appellant, H. Angelo & Company, Inc.

EAGLES, Judge.

[1] Appellant excepts to the signing of the judgment including the findings of fact and conclusions of law. This broadside exception does not present for review the sufficiency of the evidence to support any particular finding of fact. An exception to the judgment raises only two questions of law: (1) whether the facts found support the conclusions of law and the judgment, and (2) whether error of law appears on the face of the record. *City of Kings Mountain v. Cline*, 281 N.C. 269, 188 S.E. 2d 284 (1972); *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 160 S.E. 2d 728 (1968). Accordingly, the question presented in the brief—whether the trial court erred in its finding of fact that Southeastern had “care, custody or control” of the damaged barracks windows within the exclusions from coverage in the insurance policy with South Carolina—is not presented for decision.

[2] Nevertheless we have carefully examined the record. We conclude that substantial, competent evidence supports every finding of fact, that the findings of fact support each conclusion of law and the judgment and that no error of law appears on the face of the record. More specifically, there is substantial, competent evidence to support the finding that Southeastern had “care, custody or control” of the barracks windows within the meaning of South Carolina’s exclusionary clause.

The policy of insurance issued by South Carolina to Southeastern excluded coverage for property damage to: “property in the care, custody or control of the insured or as to which the in-

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sured is for any purpose exercising physical control." Article 1 of the subcontract between Angelo and Southeastern provided that the primary contract between the United States government and Angelo formed a part of the subcontract. Therefore, the technical provisions of the primary contract bear on the subcontractor's (Southeastern) responsibilities. The primary contract between Angelo and the United States government provided that:

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. . . .

c. Exterior Concrete and Masonry Surfaces. All exterior concrete and masonry surfaces shall be sandblasted to remove all paint and leave a slightly pitted surface to obtain good adhesion for the paint. . . . Temporary protective hardboard or other approved material shall be used on window openings and any other areas where damage due to sandblasting may occur.

It is clear from the language of the primary contract and subcontract that Southeastern as subcontractor had a contractual duty to protect the windows during sandblasting. The contracts' provisions demonstrate that the barracks windows were left in Southeastern's care or custody in the performance of the subcontract. Under the provision of South Carolina's exclusions either care, custody or control, or the exercise of physical control exclude coverage under the policy.

For the reasons herein stated the judgment of the trial court is affirmed.

Affirmed.

Judges JOHNSON and PARKER concur.

State v. Berryman

STATE OF NORTH CAROLINA v. ROSS ALLEN BERRYMAN

No. 8422SC1228

(Filed 15 October 1985)

1. Criminal Law § 92.4— consolidation of offenses—proper

The trial court did not err by consolidating charges of burglary and rape arising out of incidents on 6 August 1982 and 26 July 1983 where the evidence showed that the crimes were committed on both occasions against the same victim in the same house in the same bed at approximately the same time of evening, that entry was gained on both occasions through a window and the victim was forced to engage in repeated acts of intercourse, the perpetrator was not armed on either occasion, the perpetrator identified himself on both occasions as Robert Williams, and the perpetrator upon his departure told the victim that he was going to New Orleans and for her to remove or replace an item at or near the alleged point of entry. G.S. 15A-926(a).

2. Criminal Law § 89.4— prior inconsistent statements—instruction refused—no prejudice

In a prosecution for two counts of burglary and two counts of rape, there was no prejudice in the trial court's refusal to give an instruction on prior inconsistent statements where the prosecutrix testified at trial that her assailant was between 5'5" tall and 5'7" tall while she said in her statement after the first incident that her assailant was six feet tall or more, and at trial she testified that her assailant identified himself as Robert Williams during the first incident while in her statement she only said that he identified himself as Robert. Any error was not prejudicial in view of the overwhelming evidence of defendant's guilt; moreover, defendant was acquitted of the charges arising out of the first incident to which the alleged inconsistencies related.

3. Burglary and Unlawful Breakings § 5.11— burglary—evidence of breaking sufficient

There was sufficient evidence of a breaking to support a conviction for burglary where the evidence tended to show that locks had been installed in all windows except one, which was nailed shut; that painters had removed the nail from this window and had not replaced it; that defendant told the prosecutrix to remove a chair under a bush near this window; that the screen from this window was found on the ground the next day; and that a chair was found outside under this window the next day.

APPEAL by defendant from *Albright, Judge*. Judgments entered in Superior Court, IREDELL County, 13 April 1984. Heard in the Court of Appeals 28 August 1985.

Defendant was charged in bills of indictment with two counts of first degree burglary and two counts of second degree rape

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arising out of incidents occurring on 6 August 1982 and 26 July 1983.

The State presented evidence tending to show that the prosecutrix was awakened in her home around 2:00 or 3:00 a.m. on 6 August 1982 by an intruder on her bed. This intruder, who was fully clothed and wearing a mask over his head, told the prosecutrix that his name was "Robert Williams." The prosecutrix testified that she was raped four or five times by this intruder in the bedroom and living room, and was also forced to perform oral sex upon him. Before the intruder departed at 5:00 that morning, he told the prosecutrix that he had to catch a bus to New Orleans and to be sure to put the screen up in one of her windows.

On 26 July 1983, the prosecutrix was again awakened at approximately 2:00 to 3:00 a.m. by an intruder on the same bed. This time the intruder, whom the prosecutrix identified in court as defendant, was naked and unmasked. He raped her twice on the bed. The intruder had the same voice and stature as the previous intruder. The intruder identified himself as Robert Williams and said he was going to take the prosecutrix to New Orleans with him. He also commented that the prosecutrix had made several changes to her house since he had last been there. Before leaving, he told her to remove a chair under a fig bush. The prosecutrix explained that locks had been placed in all of her windows since the earlier break-in, except one that had been nailed shut. The nail had been removed from this window by painters and had not been replaced. The bush was near this window.

Two days later, a man whom a bank official identified as defendant, who said he was Robert Williams' son, attempted to cash a check payable to "Robert Williams and Son" written on the prosecutrix's account. When defendant was unable to produce sufficient identification and when bank officers said they were going to call the prosecutrix for verification, defendant left the bank. The bank officials called the police and the prosecutrix. The police apprehended defendant near the bank. When the prosecutrix arrived at the police station, she recognized defendant as the one who had raped her a few days previously.

The jury acquitted defendant of the charges arising out of the 6 August 1982 incident but found him guilty of the first degree burglary and second degree rape charges arising out of

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the later incident. From judgments imposing consecutive forty year sentences for each conviction, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Archie W. Anders, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant appellant.

JOHNSON, Judge.

The issues on this appeal are whether the court erred: (1) by consolidating the offenses occurring on 6 August 1982 and 26 July 1983 for trial; (2) by refusing to give an instruction on prior inconsistent statements; and (3) by denying defendant's motion to dismiss the first degree burglary charge. For the following reasons, we find no prejudicial error.

[1] The first issue we address is whether the court erred by consolidating the offenses occurring on 6 August 1982 and 26 July 1983 for trial. G.S. 15A-926(a) allows the consolidation of two or more offenses for trial "when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Thus, there must be a transactional connection in order to permit consolidation of offenses. *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981). A court's order denying a motion to sever and ordering the consolidation of offenses for trial will not be overturned absent a showing of an abuse of discretion. *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981).

The evidence in the present case is remarkably similar to the evidence in *State v. Williams*, 308 N.C. 339, 344, 302 S.E. 2d 441, 445 (1983), in which the Supreme Court found an "obvious 'transactional connection'" between offenses committed on separate dates. In *Williams*, the Court noted that both occasions the crimes were committed against the same person, in the same apartment at approximately the same time at night; entry was gained through an open window and a single act of intercourse was committed; the defendant was not armed; and the victim was allowed to take contraceptive measures. In the present case the crimes were committed on both occasions against the same victim in the same house in the same bed at approximately the same time of

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evening. On both occasions, entry was gained through a window and the victim was forced to engage in repeated acts of intercourse. The perpetrator was not armed on either occasion. In addition, the perpetrator identified himself on both occasions as Robert Williams, and upon his departure told the victim he was going to New Orleans and for her to replace or remove an item at or near the alleged point of entry. We hold the foregoing evidence established the requisite transactional connection to permit consolidation. We therefore find no abuse of discretion by the trial court.

[2] The next issue is whether the court erred by refusing to give an instruction on prior inconsistent statements. Defendant argues the instruction should have been given because the prosecutrix's testimony at trial differed from a statement she had given police officers after the 1982 incident in two respects: (1) at trial she testified her assailant was between 5'5" tall and 5'7" tall while she stated in her statement that her assailant was six feet tall or more; and (2) at trial she testified her assailant identified himself as "Robert Williams" during the first incident while in her statement she only said he identified himself as "Robert." Assuming *arguendo* that these omissions or discrepancies constituted inconsistent statements requiring the giving of the requested instruction, we hold the error was not prejudicial in view of the overwhelming evidence of defendant's guilt of the charges arising out of the later incident. Significantly, defendant was acquitted of the charges arising out of the first incident to which the alleged inconsistencies related.

[3] The remaining issue is whether the court erred in denying defendant's motion to dismiss the burglary charge arising out of the second incident. He concedes there was sufficient evidence of an entry but contends there was insufficient evidence of a breaking. We disagree that there was insufficient evidence of a breaking. Taken in the light most favorable to the State, the evidence tended to show that locks had been installed in all windows except one, which was nailed shut; that painters had removed the nail from this window and had not replaced it; that defendant told the prosecutrix to remove a chair under a bush near this window; that the screen from this window was found on the ground the next day; and that a chair was found outside under this window

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the next day. From this evidence the jury could infer defendant broke and entered through this window.

For the foregoing reasons, we hold defendant received a fair trial free from prejudicial error.

No error.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. RANDY CAPPS

No. 8525SC238

(Filed 15 October 1985)

Larceny § 7.5— insufficient evidence of guilt as aider and abettor

The State presented insufficient evidence to support defendant's conviction of felonious larceny as an aider and abettor where it tended to show only that the perpetrator of the larceny was a passenger in a car driven by defendant, the perpetrator asked defendant to pull into a parking lot so he could get "his" clothes out of a car, the perpetrator returned in 10 to 15 minutes with clothes and a briefcase, and the perpetrator later told defendant to pull in and "see what we've got," but there was no evidence that defendant intended to aid the perpetrator or communicated such intent to the perpetrator.

APPEAL by defendant from *Lupton, Judge*. Judgment entered 12 July 1984 in Superior Court, BURKE County. Heard in the Court of Appeals 27 September 1985.

Attorney General Lacy H. Thornburg by Associate Attorney T. Byron Smith for the State.

Appellate Defender Adam Stein by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

COZORT, Judge.

Defendant was convicted of felonious larceny and sentenced to a prison term of seven (7) years. He appeals his conviction alleging that the trial court should have granted his motion to dismiss the charges against him because the State's evidence was insufficient to prove he aided and abetted the perpetrator in the

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commission of the felonious larceny. We find the trial court erred in denying defendant's motion to dismiss.

The issue before us in this case is whether the State presented sufficient evidence for a rational trier of fact to find that the defendant aided and abetted the perpetrator in the commission of the felonious larceny.

The State's evidence, based mainly on the testimony of Debbie Hubbard, tended to show the following:

On the evening of 5 March 1984, the defendant, his girl friend, Debbie Hubbard, and Sammy Miller were traveling in a borrowed car, a green 1974 Oldsmobile, in Morganton, North Carolina. The defendant drove; his girl friend sat beside him, and Sammy Miller sat in the passenger seat. The three were riding to the store when Sammy Miller told the defendant to pull into the parking lot of Mr. T's, a nightclub in Morganton. The defendant parked the car beside the building. Sammy Miller stated that he wanted to get his clothes out of a car. Miller then reached into the back seat and got a lug wrench from the floor of the car. Miller crouched down, went around the car and toward the side of the building. Hubbard testified that she could not see Miller at this time and heard nothing after he left. There is no evidence that defendant saw Miller with the lug wrench.

Miller returned in 10 to 15 minutes with clothes and a briefcase. The three left Mr. T's and Hubbard testified that Miller said, "Let's pull in here and see what we've got." Defendant pulled into a McDonald's parking lot. Defendant got out of the car and used the men's room. There was no evidence that the defendant handled the briefcase, the clothes, or the contents of the briefcase. Only Miller handled these items.

Shortly thereafter, the three were stopped by Officer Richard Epley of the Morganton Police Department. The officer noticed a briefcase under Miller's feet and clothes in the back seat. After examining the briefcase, the officer recognized it as being similar to a briefcase which was reported stolen from a vehicle at Mr. T's. The officer requested the defendant to follow him to Mr. T's which the defendant did. Defendant was then placed under arrest.

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Defendant was indicted for felonious breaking or entering a motor vehicle and felonious larceny. The State proceeded on the theory that the defendant aided and abetted the perpetrator, Miller, in the commission of the breaking or entering and the felonious larceny and could therefore be convicted of both charges. The jury acquitted the defendant of breaking or entering a motor vehicle and convicted him of felonious larceny. Defendant's first assignment of error is that the trial court erred by denying his motion to dismiss the charge of felonious larceny because the evidence was insufficient to prove that the defendant intended to aid the perpetrator, Miller, in the larceny or that the defendant communicated his intent to aid the perpetrator.

Upon a motion to dismiss in a criminal action, "all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977); see also *State v. Dover*, 308 N.C. 372, 302 S.E. 2d 232 (1983). The State must present substantial evidence of each of the essential elements of the crime of aiding and abetting. *State v. Johnson*, 310 N.C. 574, 577, 313 S.E. 2d 560, 563 (1984). The essential elements of aiding and abetting are as follows: (1) the defendant was present at the scene of the crime; (2) the defendant intended to aid the perpetrator in the crime; and (3) the defendant communicated his intent to aid to the perpetrator. *Id.* at 578, 313 S.E. 2d at 563; *State v. Pryor*, 59 N.C. App. 1, 5-6, 295 S.E. 2d 610, 614 (1982). Thus, the pivotal question for our determination is whether the evidence is sufficient for a rational trier of fact to find that the defendant was at the scene of the larceny; intended to aid the perpetrator, Miller, in the larceny; and communicated his intent to aid to the perpetrator, Miller. We hold that the evidence was insufficient.

While the State's evidence does indicate the defendant was present at the scene of the crime, the State has failed to present substantial evidence that the defendant intended to aid Miller or communicated such intent to Miller. A defendant's mere presence at the scene of the crime does not make him guilty of felonious larceny even if he sympathizes with the criminal act and does

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nothing to prevent it. *State v. Aycoth*, 272 N.C. 48, 50-51, 157 S.E. 2d 655, 657 (1967). In this case, defendant's presence at the scene of the crime, without more, does not show intent to aid.

Intent to aid may be inferred from defendant's actions or from his relation to the perpetrator. *State v. Sanders*, 288 N.C. 285, 291, 218 S.E. 2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091 (1976). In *State v. Hockett*, 69 N.C. App. 495, 317 S.E. 2d 416 (1984), this Court found that intent to aid could be inferred where the defendant knew of the contemplated robbery, participated in discussions about the robbery, directed the driver of the "get-away" car where and how to park, waited in the car for the robbery to be completed and accepted his share of the proceeds. The evidence in this case shows only that Miller told defendant he was going to get *his* clothes. There is no evidence that (1) defendant drove Miller to Mr. T's with the purpose of aiding and abetting him in the commission of the larceny; (2) defendant observed Miller commit the crime; (3) defendant handled the stolen items; or (4) defendant participated in any discussions about the crime. There is no evidence from which the jury could infer that the defendant gave active encouragement to Miller, or that he made it known to Miller that he was ready to render assistance, if necessary.

The State contends that intent should be inferred from Miller's statement telling defendant to pull in and see "what we've got." Under the facts of this case, we find this argument unpersuasive. Although there are circumstances which point suspicion toward defendant, insufficient evidence exists from which intent to aid can be inferred. The State's evidence fails to show that defendant intended to aid Miller in the crime or that defendant communicated intent to aid to Miller.

The trial court should have granted defendant's motion to dismiss. We find it unnecessary to address defendant's remaining assignment of error.

Reversed.

Judges WHICHARD and EAGLES concur.

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STATE OF NORTH CAROLINA v. DARRELL YATES FIELDS

No. 8424SC1335

(Filed 15 October 1985)

Automobiles and Other Vehicles § 121— driving while impaired—sitting behind steering wheel of motionless car with motor running—evidence sufficient

The court did not err by denying defendant's motion to dismiss the charge of driving while impaired where the State's evidence was that defendant was found upon a street in Blowing Rock behind the wheel of a motionless car with the engine running, and defendant's evidence was that he had started the car in order to operate the heater and had no intention of driving. One "drives" within the meaning of G.S. 20-138.1 if he is in actual physical control of a vehicle which is in motion or which has the engine running; defendant's purpose for taking actual physical control of the car and starting the engine is irrelevant. G.S. 20-4.01(7).

APPEAL by defendant from *Lamm, Judge*. Judgment entered 12 September 1984 in Superior Court, WATAUGA County. Heard in the Court of Appeals 16 September 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General W. Dale Talbert for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Geoffrey C. Mangum for defendant appellant.

COZORT, Judge.

On 12 September 1984 defendant was convicted of driving while impaired in violation of G.S. 20-138.1. On appeal defendant assigns as error the trial court's "failing to dismiss the charge of driving while impaired when the State offered no evidence the motor vehicle had been in motion or that defendant cranked the motor for purposes of driving the car." The sole issue presented by this assignment of error is whether the defendant was "driving" a vehicle within the meaning of G.S. 20-138.1 when he sat behind the steering wheel in the driver's seat of the car and started the car's engine in order to make the heater operable, but the car remained motionless on the street. We find no error.

The State's evidence tended to show the following: On 10 February 1984 at 1:14 a.m. then Blowing Rock Police Department Patrolman Jack Cooper saw a car sitting in the right-hand lane

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just across the center line of West Green Hill Drive in Blowing Rock. Patrolman Cooper pulled his patrol car in front of the stopped car, got out of his car and approached the other car. Patrolman Cooper found the defendant sitting behind the wheel of the motionless car with the engine running. Patrolman Cooper observed the owner of the vehicle, Mr. Honeycutt, on the passenger side of the vehicle. Defendant's eyes were glassy, his face was flushed, and he had a moderate odor of alcohol on his breath. Patrolman Cooper administered certain sobriety performance tests to the defendant, arrested the defendant and transported him to Watauga County Jail to have a breathalyzer test administered. At trial the defendant stipulated to admission of the affidavit and revocation report of the breathalyzer operator which showed that "a breathalyzer was performed at 3:05 a.m. on the 10th of February on the Defendant, and that his alcohol concentration was a point fourteen." Patrolman Cooper never saw the car move while the defendant was sitting behind the wheel.

At trial defendant did not dispute the State's evidence. Rather, defendant and Mr. Honeycutt testified: that Mr. Honeycutt drove the car on the night in question; that defendant never drove the car; that the reason they had stopped on the street was to get out and use the bathroom; and that defendant got back into the car behind the wheel and cranked the car up to turn the heat on because he was cold. Defendant further testified that he never put the car in gear and that the car never moved while he was behind the wheel.

Defendant contends that the trial court should have dismissed the driving while impaired charge because the State never proved he "drove" the car within the meaning of G.S. 20-138.1. G.S. 20-138.1(a) provides in pertinent part:

(a) Offense.—A person commits the offense of impaired driving if he *drives* any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance;
or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the *driving*, an alcohol concentration of 0.10 or more. [Emphasis added.]

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Defendant's position is that under G.S. 20-138.1(a) "drives" requires that the car be in motion or at least that a "defendant had the engine running for the purpose of moving the car." Defendant's position is not the law.

In *State v. Coker*, 312 N.C. 432, 436, 323 S.E. 2d 343, 347 (1984), our Supreme Court noted that while "Chapter 20 of the General Statutes contains no definition of 'drive' or 'operate,' 'driver' and 'operator' are defined." While the Supreme Court recognized that in the past distinctions have been made between "driving" and "operating," it did not believe such a distinction currently exists. 312 N.C. at 436, 323 S.E. 2d at 347. The Supreme Court explained its reasoning in the following way:

In N.C.G.S. 20-4.01(7), "driver" is defined as "the operator of a vehicle." "Operator" is defined as "a person in actual physical control of a vehicle which is in motion or which has the engine running." N.C. Gen. Stat. 20-4.01(25).

We recognize that distinctions may have been made between driving and operating in prior case law and prior statutes regulating motor vehicles. See e.g. *State v. Carter*, 15 N.C. App. 391, 190 S.E. 2d 241 (1972) (interpreting "driving" under a former statute to require motion); Act of March 5, 1935, Chapter 52, Sec. 1, 19 Public Laws 34, (formerly codified at N.C. Gen. Stat. 20-6 (1935)) (repealed 1973) (defining "operator" as a person who is in the driver's seat while the engine is running or who steers while the vehicle is being towed or pushed by another vehicle).

We do not believe, however, that such a distinction [between "driving" and "operating"] is supportable under N.C.G.S. 20-138.1. Since "driver" is defined simply as an "operator" of a vehicle, we are satisfied that the legislature intended the two words to be synonymous.

Id. Accordingly, we hold that one "drives" within the meaning of G.S. 20-138.1 if he is in actual physical control of a vehicle which is in motion or which has the engine running. In this case the State's evidence showed that the defendant sat behind the wheel of the car in the driver's seat and started the engine. This evidence was sufficient to show that the defendant was in actual physical control of a vehicle which had the engine running. Thus,

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the State's evidence was sufficient to show that the defendant "drove" a vehicle within the meaning of G.S. 20-138.1. Defendant's purpose for taking actual physical control of the car and starting the engine is irrelevant.

We take judicial notice of the fact that during the 1985 Session of the General Assembly, G.S. 20-4.01 was amended to provide that "[t]he terms 'driver' and 'operator' and their cognates are synonymous." 1985 N.C. Sess. Laws Ch. 509.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

LAWRENCE WILLIS, DAVID RUSHING, T. B. RUSHING, T. BENNY RUSHING, GLADYS KELLY, SAM KELLY, BOBBY GRIFFIN, DARLENE GRIFFIN, WILLIAM H. WALTERS, PAUL MURRAY, JESSE WRIGHT, RENEE WRIGHT, PATRICIA STURDIVANT, ALLEN GRIFFIN, ELIZABETH H. TUCKER, CARROLL TUCKER, CARROLL GRIFFIN, JULIA GRIFFIN, HAROLD LITTLE, JO ANN LITTLE, J. V. ROBERSON, MILLIE ROBERSON, E. GADDY HELMS AND GEORGIA B. HELMS v. UNION COUNTY, UNION COUNTY BOARD OF COMMISSIONERS, RALPH H. GRIFFIN, O. HARRELL GRIFFIN, PATSY E. GRIFFIN AND NELL C. GRIFFIN

No. 8420SC1351

(Filed 15 October 1985)

1. Counties § 5.1; Municipal Corporations § 30.9— comprehensive plan for zoning—genuine issue of material fact

A genuine issue of material fact was presented as to whether Union County has a comprehensive plan for zoning as required by G.S. 153A-341 where the record in this case reveals no evidence regarding the substance of the Union County zoning ordinance or what property the ordinance covers other than one section dealing with permitted uses under the zoning classification sought by the individual defendants; Union County and the Union County Board of Commissioners admitted plaintiffs' allegation that there was no comprehensive plan in Union County; and in their answers to interrogatories defendants stated that Union County has a land development plan and that the property in question is not included in that plan.

2. Counties § 5.1; Municipal Corporations § 30.9— contract zoning—genuine issue of material fact

A genuine issue of material fact was presented as to whether the rezoning of defendants' property from R-10 to R-8 constituted unlawful contract zoning

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where there was evidence that defendants' attorney referred to specific plans for a proposed apartment building to be constructed on the property and represented that no mobile homes would be placed on the property even though the R-8 zoning classification permitted mobile homes.

APPEAL by plaintiffs from *Mills, Judge*. Judgment entered 29 August 1984 in Superior Court, UNION County. Heard in the Court of Appeals 22 August 1985.

Plaintiffs appeal from an order granting summary judgment in favor of all defendants. The individual defendants filed a petition seeking to have their property in Union County rezoned. On 9 May 1984 the Union County Board of Commissioners voted unanimously to rezone the property from R-10 to R-8. Plaintiffs began this action seeking a declaratory judgment that the rezoning was invalid. On 29 August 1984 the trial court granted summary judgment as to all defendants. The plaintiffs appealed.

Joe P. McCollum, Jr., for plaintiff appellants.

Griffin, Caldwell, Helder & Steelman, by Thomas J. Caldwell, for defendant appellees Union County and Union County Board of Commissioners.

Thomas, Harrington & Biedler, by Larry E. Harrington, for defendant appellees Ralph H. Griffin, O. Harrell Griffin, Patsy E. Griffin and Nell C. Griffin.

WEBB, Judge.

The plaintiffs contend that the trial court erred in granting defendants' motions for summary judgment for two reasons. They argue that genuine issues of material fact exist as to whether Union County maintained a comprehensive land use plan as required by G.S. 153A-341 and whether the amendment to the ordinance constituted contract zoning. We believe both these arguments have merit.

[1] G.S. 153A-341 provides in part that "zoning regulations shall be made in accordance with a comprehensive plan. . . ." This language does not require "an extensive written plan, such as a master plan based upon a comprehensive study . . . [t]he ordinance itself may show that the zoning is comprehensive in nature." *Allred v. City of Raleigh*, 7 N.C. App. 602, 607, 173 S.E.

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2d 533, 536 (1970), *rev'd on other grounds*, 277 N.C. 530, 178 S.E. 2d 432 (1971). In *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979), the Supreme Court found that the City of Raleigh maintained a sufficiently comprehensive plan despite some minor inconsistencies. In so finding, however, the Court relied upon evidence presented at the summary judgment hearing that the city had a comprehensive set of zoning regulations which cover the entire city and that comprehensive studies had been conducted on the city's housing, transportation, public facilities, parks and recreation and other needs.

Other than one section dealing with permitted uses under the zoning classification sought by the individual defendants, the record in this case reveals no evidence regarding the substance of the Union County zoning ordinance or what property the ordinance covers. Furthermore, in their answer Union County and the Union County Board of Commissioners admitted plaintiffs' allegation that there was no comprehensive plan in Union County. In their answers to interrogatories defendants stated that Union County has a land development plan and that the property in question is not included in that plan. We conclude that this evidence creates a genuine issue of material fact as to the existence in Union County of a comprehensive land use plan.

[2] Plaintiffs also argue that the trial court should have denied summary judgment because there existed a genuine issue as to whether the action in this case constituted unlawful contract zoning.

A county's legislative body has authority to rezone when reasonably necessary to do so in the interests of the public health, safety, morals or general welfare. Ordinarily the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously. However to avoid contract zoning, all the areas in each class must be subject to the same restrictions. If the rezoning is done in consideration of an assurance that a particular tract or parcel will be developed in accordance with a restricted plan this is contract zoning and is illegal. See *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971).

In this case there is evidence that at meetings regarding the rezoning petition, defendants' attorney Harrington referred to specific plans, including drawings and rental rates for a proposed

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apartment building to be constructed on the property. There is also evidence that Harrington made representations at the various hearings to the effect that there should be no concern about mobile homes on the property after rezoning because the defendants were willing to put restrictions in the deeds prohibiting mobile homes. Under section 85 of the Union County zoning ordinance mobile homes are a permitted use in areas zoned R-8, the new classification proposed by defendants. Defendants deny any such promise and offer the attorney's affidavit in support of their position. The minutes of the first two meetings show that Harrington did mention restrictions in the deeds. The minutes of the third meeting, at which the defendants' petition was granted, do not mention any proposed deed restrictions but only summarize the proceedings. The record also contains the affidavit of Bobby H. Griffin, one of the plaintiffs, who states that he was at the final hearing before the Board of Commissioners and that Harrington stated that the property would be used for apartment buildings and that no mobile homes would be placed on the property. This evidence is in obvious conflict. We conclude that this evidence presents a genuine issue of material fact as to whether defendants' action in this case constituted unlawful contract zoning.

Because the evidence relied upon at the summary judgment hearing created genuine issues of material fact regarding the existence in Union County of a comprehensive land use plan and regarding unlawful contract zoning, summary judgment was inappropriate.

Reversed and remanded.

Judges BECTON and MARTIN concur.

Pierce Concrete, Inc. v. Cannon Realty & Construction Co.

PIERCE CONCRETE, INC. v. CANNON REALTY & CONSTRUCTION CO.,
INC., AND CLAYTON CANNON D/B/A CANNON CONSTRUCTION COMPANY

No. 853DC169

(Filed 15 October 1985)

Corporations § 8— personal liability of corporate president for debt—summary judgment for plaintiff proper

Summary judgment was properly granted for plaintiff against the individual defendant, the corporate president, in an action by a supplier on a building materials account where defendant's corporate charter had been suspended before the deliveries for which plaintiff claimed payment and defendant's president had signed three company checks for payments on the account without any representation as to his signatory capacity. Purported corporate acts performed during the period of suspension are generally invalid and of no effect, the individual defendant's authority to act as agent of the corporation extended only to matters within the ordinary scope of the corporation's business, the suspended corporation had no statutory right to conduct as part of its ordinary business the transactions at issue here, nothing in the record suggests any course of dealing between plaintiff and the corporation which would charge plaintiff with knowledge that the corporation would not honor defendant's promises, defendant raised no defense to his personal liability, defendant admitted that the goods had been received, the prices were reasonable, payment had been duly demanded and not made, and the amount of the debt was not disputed. G.S. 105-231.

APPEAL by defendant Clayton Cannon from *Ragan, Judge*. Judgment entered 17 October 1984, *nunc pro tunc* 8 October 1984, in District Court, CRAVEN County. Heard in the Court of Appeals 25 September 1985.

Plaintiff supplier sued for the balance due on a building materials account. Plaintiff's delivery receipts indicated delivery to "Cannon Realty" and "Cannon Construction Co." Cannon Realty was a corporation whose full name was "Cannon Realty & Construction Co., Inc." Defendant Clayton Cannon, who also did business as "Cannon Construction Co.," was the president of the corporation. The corporate charter had been suspended by the State Department of Revenue in March 1982, for non-payment of franchise taxes, and was never reinstated. The deliveries for which plaintiff claimed payment all took place after August 1982, the opening month of the account at issue. Three payments were made on the account after August 1982, all by checks written on the account of Cannon Construction Co. and signed by Clayton

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Cannon without any representation as to his signatory capacity. Plaintiff moved for summary judgment on the foregoing facts. From judgment for plaintiff against him in the amount of the account, defendant Clayton Cannon appeals.

Henderson, Baxter & Alford, by Benjamin G. Alford, for plaintiff-appellee.

Bennett, McConkey, Thompson and Marquardt, by Thomas S. Bennett and James Q. Wallace, III, for defendant-appellant.

EAGLES, Judge.

The question presented is whether summary judgment was appropriate, i.e., was there a genuine issue of material fact as to whether the unpaid account constituted an indebtedness of the suspended corporation or an individual indebtedness of Clayton Cannon. On this record we conclude that the trial court was correct in allowing summary judgment against Clayton Cannon personally for the amount of the account.

I

The purpose of summary judgment is to prevent unnecessary trials when there are no genuine issues of fact and the defenses are frivolous, and to separate any issues that are present. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Even though issues of fact may exist, summary judgment should be granted if those factual issues are not material. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976). Once the movant has established its right to summary judgment, the non-movant may not rest upon conclusory allegations but must come forward with affidavits showing that a material factual dispute exists. *Id.* Assuming *arguendo* that defendant has raised a legitimate factual issue, we conclude that that issue is not material.

II

When a corporate charter has been suspended for failure to pay franchise taxes, as here, the corporation loses its state-granted privileges. G.S. 105-230. Purported corporate acts performed during the period of suspension are generally invalid and of no effect. G.S. 105-231. The effect of G.S. 105-231 is not absolute, *Parker v. Life Homes, Inc.*, 22 N.C. App. 297, 206 S.E. 2d

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344 (1974) (approving purchase and sale of property by suspended corporation), but it certainly prevents corporations from continuing to conduct their business as usual. R. Robinson, N.C. Corporation Law and Practice 29-16 (3d ed. 1983); see G.S. 55-114(b) (dissolved corporation remains in existence only to wind up affairs). Defendant admits that the corporate charter was suspended, yet argues that he is not personally liable for these purchases because they were made by the corporation.

III

Defendant admitted that he and his agents received the supplies; he contends, however, that they acted on behalf of the corporation. Even if we were to assume that the suspended corporation could take delivery and enter into an agreement to pay, individual defendant, to the extent he was involved, was acting in his capacity as president and agent of the corporation. G.S. 55-34; *Burlington Industries, Inc. v. Foil*, 284 N.C. 740, 202 S.E. 2d 591 (1974). His authority as agent of the corporation extended only to matters within the ordinary scope of the corporation's business. *Id.* As discussed above, the suspended corporation had no statutory right to conduct as part of its ordinary business the August 1982 and later transactions which are at issue here. G.S. 105-231. Nothing in this record suggests any course of dealing between plaintiff and the corporation which would charge plaintiff with knowledge that the corporation would not honor defendant's promises. See *Stansell v. Payne*, 189 N.C. 647, 127 S.E. 693 (1925). Here defendant acted outside the scope of his authority and would be personally liable even if we were to accept his contention that he was acting on behalf of the suspended corporation. See *Whitten v. Bob King's AMC/Jeep, Inc.*, 30 N.C. App. 161, 226 S.E. 2d 530 (1976) (president had no authority to contract, liable personally unless specifically relieved by language of contract), *rev'd on other grounds*, 292 N.C. 84, 231 S.E. 2d 891 (1977); *Borbein, Young & Co. v. Cirese*, 401 S.W. 2d 940 (Mo. App. 1966) (affirming directed verdict that officers of corporation which continued to do business after charter forfeiture personally liable); 19 Am. Jur. 2d Corporations Section 1348 (1965). In *Borbein* the court applied Missouri statutes, mandating that the officers were trustees for the corporation even after charter forfeiture, and found personal liability accordingly. While corporate officers in North Carolina are not trustees, their fiduciary duty to the cor-

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poration is a high one. G.S. 55-35; *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E. 2d 551 (1983). This includes a duty *not* to continue to incur ordinary business obligations on behalf of the corporation when they have knowledge that the corporation's charter has been suspended. The law will not permit a corporate officer to create obligations in the name of the corporation, knowing the acts are without authority and invalid, and then be permitted to use the corporate name as shield against the creditors.

IV

If defendant did not act on behalf of the corporation, he acted in his own behalf. Defendant has raised no defense to his personal liability. Defendant admitted that the goods had been received, that the prices were reasonable, and that payment had been duly demanded and none made. The amount of the debt was not disputed. No issue of fact whatsoever appears on this point.

V

Regardless of whether the supplies were delivered to the corporation, through its agent, defendant, or to defendant personally, plaintiff properly showed that it was entitled to payment from defendant. Defendant raised no material issue of fact requiring further litigation. Summary judgment for plaintiff was proper and the court's order is therefore

Affirmed.

Judges WHICHARD and COZORT concur.

STATE OF NORTH CAROLINA v. DENNIS WATT LOCKLEAR

No. 8412SC1106

(Filed 15 October 1985)

1. Arrest and Bail § 3.5— probable cause to arrest for possession of burglary tools

An officer had probable cause to arrest defendant for possession of burglary tools when he found defendant in a truck behind a closed grocery store in the dark of night, observed pry-marks on the rear door of the store, found frozen meat in the truck bed stamped with the lot number of a cold

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storage market, and observed bolt cutters, a flashlight and a tire iron in the passenger compartment of the truck. Therefore, items seized from defendant's truck were not obtained as the result of an illegal arrest.

2. Larceny § 8.4— instructions on recent possession doctrine

Defendant was not prejudiced by the trial court's refusal to give defendant's requested instruction on the doctrine of recent possession that defendant must have had possession of the stolen property under such circumstances as to make it unlikely that he obtained possession "by any other way than by committing the offenses of breaking or entering and larceny with which he is charged" rather than the instruction given that he must have had possession under such circumstances "as to make it unlikely that he obtained possession honestly."

APPEAL by defendant from *Johnson, E. Lynn, Judge*. Judgments entered 3 May 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 August 1985.

Defendant was convicted of three counts of felonious breaking and entering, three counts of felonious larceny, five counts of feloniously breaking or entering a motor vehicle, and five counts of misdemeanor larceny. He was initially arrested for possession of burglary tools and a search made pursuant thereto led to the other charges and convictions. Before trial defendant moved to suppress the evidence so obtained, and at a hearing on this motion the evidence presented tended to show the following:

About 5 o'clock on the morning of 6 December 1983 a Cumberland County Deputy Sheriff patrolling in his car observed a lighted pickup truck parked behind a Food Lion grocery store in Hope Mills. As he approached the truck pulled off and the deputy, observing pry-marks on the rear door of the store and suspecting that a break-in had occurred or been interrupted, followed the truck until it pulled into the driveway of a residence. On the way the deputy radioed the truck's license number to the Sheriff's Department and was told that it was issued to defendant. After the truck stopped the deputy approached it on foot and saw an open cooler in the rear bed of the truck which contained paper covered packages, one of which was stamped "Bladen Cold Storage, lot number 4724." He asked the Sheriff's Department by radio to check the lot numbers for a theft complaint and then questioned defendant as to the route taken and his purpose. Defendant told him that the drive behind the Food Lion store was a short cut to where he was going and he was at the residence in-

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volved to do some work for its owner. In plain view in the passenger compartment of the truck the deputy saw some bolt cutters, a flashlight, and a tire iron, and he arrested defendant for possession of burglary tools. After the arrest the deputy and another officer searched the truck and found numerous articles that had been stolen earlier that night from several different structures and motor vehicles situated in different parts of the county. The stolen articles so found included a chain saw, an air pressure tank, a rod and reel, a case of oil, a pellet gun, several packages of frozen meat, a cassette recorder, two cartons of cigarettes, a tool box, various articles of clothing, several tools of different kinds, about twenty pints of apple butter, a bolt cutter, a shotgun, and a Rockwell electric saw. It was ascertained later that the Food Lion store had not been broken into and none of the stolen articles came from there, though there was a pry-mark of uncertain age on the store's back door, as the deputy had observed. After finding facts somewhat as stated above, the court concluded that the officer had probable cause to arrest the defendant and refused to suppress the evidence involved.

Attorney General Thornburg, by Assistant Attorney General William N. Farrell, Jr., for the State.

Appellate Defender Stein, by Assistant Appellate Defender David W. Dorey, for defendant appellant.

PHILLIPS, Judge.

[1] By his first assignment of error defendant contends that the trial court erred in denying his motion to suppress the evidence seized from his pickup truck following his arrest for possessing burglary tools. The question raised is whether the arrest, which was the basis for the search, was without probable cause in violation of the Fourth Amendment of the United States Constitution. Probable cause to arrest a person requires circumstances sufficient to cause a reasonable and prudent law enforcement officer to believe in good faith that a crime is being or has been committed and that the person arrested is the offender. *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973). We believe, as the trial judge held, that there was probable cause to arrest the defendant for possession of burglary tools and this assignment is overruled. Defendant's presence behind the closed grocery store

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in the dark of night with a truck; the pry-marks on the store's rear door indicating a possible break-in; the frozen meat in the truck bed stamped with the apparent lot number of a cold storage market; along with the implements suitable for accomplishing a burglary in the front of the truck combined to indicate that defendant unlawfully possessed burglary tools and had recently used them.

[2] By his only other assignment of error defendant contends that the trial court committed prejudicial error by refusing to charge as he requested on the doctrine of recent possession. In instructing the jury on this doctrine the court in pertinent part stated that for the doctrine to apply the State had to prove beyond a reasonable doubt: (1) That property allegedly stolen was stolen; (2) that the defendant was in possession of that same property; and (3) "that the defendant had possession of this same property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly." This instruction, which tracks Crim. Sec. 104.40 of the North Carolina Pattern Jury Instructions (1977), was approved by this Court in *State v. O'Kelly*, 20 N.C. App. 661, 202 S.E. 2d 482, *rev'd on other grounds*, 285 N.C. 368, 204 S.E. 2d 672 (1974), on the authority of *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968), and various other decisions cited therein. The modification that defendant requested in lieu of the phrase "as to make it unlikely that he obtained possession honestly" would have instructed the jury that:

And third, that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession *by any other way than by committing the offenses of breaking or entering and larceny with which he is charged*.

While the "honestly obtained" part of the charge that was given is neither a helpful nor a necessary accretion to the doctrine of recent possession—the effect and purpose of which is to prove not that a defendant obtained goods dishonestly but that he stole them—which should be eliminated from the pattern instructions, in our opinion, in the context of this case we do not believe that the defendant was prejudiced by it. And though defendant's requested instruction could have been properly given, we do not believe that the court's failure to give it affected the outcome of the case.

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No error.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. HERMAN LEE GLOVER

No. 8521SC125

(Filed 15 October 1985)

Criminal Law § 128.2— defendant's criminal record—mistrial denied—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for felonious larceny when it denied defendant's motion for a mistrial after an officer testified, in response to a question concerning whether defendant went by another name, that defendant had numerous charges in the records division. The trial court properly sustained defendant's objection and instructed the jury to disregard the witness's answer, and defendant was not deprived of his constitutional right to remain silent because he clearly took the stand to rebut the State's evidence that he committed the crime and not to answer the State's evidence regarding other charges.

APPEAL by defendant from *Wood, Judge*. Judgment entered 28 September 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 September 1985.

This is a criminal case in which defendant was charged with felonious larceny in violation of G.S. 14-72. Upon a plea of not guilty, the defendant was tried before a jury and found guilty.

The essential facts are:

On 8 March 1984 at approximately 1:00 o'clock p.m. a money box containing \$1,900.00 in cash and \$960.00 in checks was stolen from the Winston-Salem Barber School (the School). The State presented evidence that on 8 March 1984 around 1:00 o'clock p.m. a black man was seated in the reception area of the School. He was observed by several people working at the School that day, including Miss Sandy. Miss Sandy, a student, was in her barber's chair approximately 20 feet away from the man seated in the reception area and approximately seven to nine feet away from the counter where the money box was located. Miss Sandy stated that the man wore a red toboggan, sunglasses and blue jeans. As

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she was watching him, the man got up out of his chair and walked over to the counter. He picked up the telephone receiver and then replaced it. He then reached over the counter, picked up the money box, and ran out the door. Miss Sandy went over to the door, looked out and saw the man running through a parking lot. Mr. Whitney, the secretary/treasurer of the School, and several students gave chase but were unable to apprehend the man.

Miss Sandy later identified the man at the School from a photographic lineup. She identified a photograph of the defendant.

Betty Barnes, another student, was also working there on 8 March 1984. She testified that she had known the defendant for more than three years. She saw him at the School around 1:00 p.m. on 8 March 1984. He waved to her and she said "Hey, Glover" and asked him what he was doing there. He told her that he was waiting for someone. She asked if he would like a haircut and he told her "No." Miss Barnes also identified the defendant from a photographic lineup.

The defendant presented evidence which tended to show that he worked for Mrs. Dorothy Felder. Mrs. Felder testified that from 10:30 a.m. until 4:00 p.m. on 8 March 1984 she was with the defendant, running errands and visiting her sister in the hospital. Other witnesses testified for the defendant corroborating his alibi.

From his conviction and the judgment imposing a sentence of five years, the defendant appeals.

Attorney General Thornburg by Special Deputy Attorney General H. A. Cole, Jr., for the State.

Dan S. Johnson, for the defendant-appellant.

EAGLES, Judge.

By his sole assignment of error, the defendant contends that the trial court erred when it denied his motion for mistrial, when the motion was based on the admission of defendant's criminal record by incompetent and highly prejudicial evidence which violated the defendant's constitutional right to remain silent. We disagree.

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Defendant's only assignment of error is based on two exceptions. However, the exceptions do not appear in the record except under the purported assignment of error. These exceptions are worthless and will not be considered on appeal. *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956).

Under our former Rules . . . , the appeal itself constituted an exception to the judgment and presented for review any error appearing on the face of the record proper. [Citations omitted.] Our present Rules of Appellate Procedure, effective 1 July 1975, obliterated the former distinction between the "record proper" and the "settled case on appeal." Instead, the single concept of "record on appeal" is used and the composition of the record on appeal is governed by Rule 9(b), Rules of Appellate Procedure.

State v. Samuels, 298 N.C. 783, 785-86, 260 S.E. 2d 427, 429-30 (1979).

The crux of this appeal involves certain testimony of Officer Larry Reavis. The pertinent portions, excerpted from the record, are as follows:

Q. Do you know of your own knowledge whether or not the defendant goes by another name other than Herman Lee Glover?

MR. JOHNSON: Object, Your Honor, it would have to be hearsay.

COURT: Overruled.

A. He had numerous charges in our records division—

MR. JOHNSON: Your Honor, object.

COURT: Sustained. That's not responsive. Members of the jury, don't consider that answer.

Q. Simply do you know of your own knowledge whether or not the defendant goes by a name other than Herman Lee Glover?

A. I do.

Defense counsel promptly objected, and the trial judge promptly sustained the objection and instructed the jury to dis-

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regard the witness' answer. While psychologists may debate a juror's ability to ignore spoken words and erase their impressions from his mind, our legal system through trial by jury operates on the assumption that a jury is composed of men and women of sufficient intelligence to comply with the court's instructions and they are presumed to have done so. *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938). A defendant's motion for mistrial must be granted, as required by G.S. 15A-1061, "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." The decision as to whether prejudice has occurred is addressed to the discretion of the trial judge. *State v. Rogers*, 52 N.C. App. 676, 279 S.E. 2d 881 (1981). His decision is not reviewable absent a showing of gross abuse of discretion. *State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978). There is no abuse here.

The witness' nonresponsive statement did not violate the defendant's constitutional right to remain silent and the defendant is not entitled to a new trial. Contrary to defendant's argument, it is clear from the transcript of the defendant's testimony that the defendant took the stand, not to answer the State's evidence regarding other charges, but in order to rebut the State's evidence that he committed the crime.

A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

Harrison v. United States, 392 U.S. 219, 222, 20 L.Ed. 2d 1047, 1051, 88 S.Ct. 2008, 2010 (1968).

We find no error in the judgment or in the record on appeal which warrants a new trial.

No error.

Judges JOHNSON and PARKER concur.

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CAROL CARTER GRAHAM v. ALFRED ALDRICH GRAHAM, JR.

No. 8520DC9

(Filed 15 October 1985)

1. Divorce and Alimony § 18.17— temporary alimony and child support order— provision for reconsideration— failure to reconsider within time stated

A temporary alimony and child support order was neither void nor voidable because the trial judge had noted that "this cause shall be calendared for reconsideration within one hundred eighty (180) days from the date hereof, if not previously disposed of by trial," and no hearing or final disposition by trial occurred within the one hundred eighty (180) days.

2. Divorce and Alimony § 21.5— alimony and child support order— willful contempt— remand for findings as to ability to comply

A judgment finding defendant in willful contempt for failure to comply with a temporary alimony and child support order is vacated and the cause is remanded for further findings as to defendant's ability to comply with the order where the order required defendant to pay \$2,480.00 per month in alimony and child support plus a \$1,100.00 attorney fee, and defendant testified that he must pay \$500.00 per month into a bankruptcy wage earner plan, that he owes the IRS \$107,000.00 and three of his paychecks have been garnisheed for that debt, and that his monthly income is \$2,600.00.

APPEAL by defendant from *Burris, Judge*. Judgment entered 6 August 1984 in District Court, MOORE County. Heard in the Court of Appeals 16 September 1985.

Seawell, Robbins, May, Rich & Scarborough by P. Wayne Robbins for defendant appellant.

No brief filed for plaintiff appellee.

COZORT, Judge.

Defendant was found in willful contempt of court for failure to comply with a previous order for alimony and counsel fees. For the reasons set forth below we remand the case to the trial court for further findings of fact.

On 4 February 1983, plaintiff filed a complaint for temporary alimony, divorce from bed and board, child support, and counsel fees. On 2 June 1983, the trial judge entered an order finding that plaintiff and defendant separated on 5 January 1983; that plaintiff was earning \$514.00 per month net; that plaintiff had no other assets or estate except for her interest in the marital home; that

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plaintiff had presented an affidavit reflecting that the reasonable monthly expenses for herself were \$1,098.03 and for the children were \$2,475.18; that defendant's annual income was \$52,000.00; and that plaintiff's attorney fees were \$1,100.00. The trial judge concluded that plaintiff was a dependent spouse and was entitled to alimony pendente lite and temporary child support, custody of their five minor children, and counsel fees. He ordered defendant to pay \$800.00 per month alimony pendente lite, \$1,500.00 per month temporary child support, \$1,100.00 to plaintiff's attorney, and the \$180.00 monthly mortgage payments on their house. The trial judge noted in the order: "That this cause shall be calendared for reconsideration within one hundred eighty (180) days from the date hereof, if not previously disposed of by trial."

On 3 August 1983, plaintiff filed a motion alleging that defendant was in arrears. On 25 October 1983, the trial court found defendant in arrears of \$4,700.00 and adjudged defendant in contempt of court. Defendant was placed in jail on or about 28 October and released on 18 November 1983.

At a subsequent contempt hearing on 6 August 1984, plaintiff testified that defendant was in arrears on the alimony payments, had not paid her attorney, and had not made the mortgage payments since January 1984. Defendant testified that he had been assessed \$107,000.00 by the IRS for unpaid taxes and that three of his paychecks had been garnisheed by the IRS. The trial judge found defendant in arrears \$9,970.00 on court ordered payments. Because defendant had a reduced ability to pay due to the garnishment of his paychecks, only \$5,170.00 of the arrearage was found to be willful. The court found defendant in willful contempt of court and ordered him held in custody for ninety days, unless he purged himself of contempt by paying \$1,100.00 to plaintiff's attorney; \$5,170.00 in alimony; and a \$900.00 mortgage payment. The temporary alimony was reduced to \$325.00 per month, and the child support was reduced to \$1,200.00 per month. From this judgment defendant appeals.

[1] Defendant's first argument is that the 2 June 1983 order for temporary alimony and child support was void and defendant could not be held in contempt for failure to comply with a void order. Defendant contends the order was void because the judge had noted that "this cause shall be calendared for reconsideration

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within one hundred eighty (180) days from the date hereof, if not previously disposed of by trial." He argues the order had "lapsed" and was no longer in force because no hearing was held within 180 days of 2 June 1983 and there had been no final disposition by trial.

A judgment is void if it is rendered by a court which has no authority to consider the question in dispute or no jurisdiction over the parties or their interest in the subject matter. *East Carolina Lumber Co. v. West*, 247 N.C. 699, 102 S.E. 2d 248 (1958). A void judgment is not binding on the parties. *Id.* An order which is irregular or erroneous is voidable, and binding on defendant until corrected in a proper manner. *Menzel v. Menzel*, 250 N.C. 649, 110 S.E. 2d 333 (1959). We find that the order in the instant case was neither void nor voidable. The trial judge simply noted that the case would be calendared for reconsideration. This did not make the order irregular in any way.

[2] Defendant's next argument is that the trial court erred in finding him in willful contempt for his noncompliance with the order. Defendant contends that he did not have the means to comply with the order. If defendant did not have the means to make the monthly payments, he should have moved for a modification of the child support order under G.S. 50-13.7(a), and a modification of the alimony pendente lite order under G.S. 50-16.9(a). Defendant's failure to do so is not evidence of willful contempt, however. The trial judge must find that defendant "is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order." G.S. 5A-21(a). Under the June 1983 order defendant was required to pay \$800.00 per month alimony pendente lite, \$1,500.00 per month child support, \$180.00 per month mortgage payment, and a \$1,100.00 attorney fee. This is a total of \$2,480.00 per month, plus the \$1,100.00 fee. Additionally, defendant testified that he must pay \$500.00 per month into the wage earner plan with the Bankruptcy Court, and he owes the IRS \$107,000.00. Defendant's annual gross salary in 1983 was found to be \$47,047.00, plus \$9,000.00 from his farm; a total of \$56,047.00. There was no evidence of how defendant was going to pay his debt to the IRS, although he said that three paychecks had been garnisheed. In short, defendant must pay \$2,980.00 per month, plus attorney fees, and \$107,000.00 to the IRS. Defendant contends that his net monthly pay is \$2,600.00 (which was not

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found as fact by the trial judge). We hold that the court's findings on the defendant's monthly income, debts, and ability to pay are insufficient to support the determination that his failure to pay constituted willful contempt. The trial court must make additional findings of fact on defendant's net monthly income, his other assets, if any, and his repayment schedule to the IRS. The court can then determine whether defendant is able to comply with the order, and thus whether his nonpayment was willful contempt.

For this reason we remand for additional findings of fact.

Vacated and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. MICHAEL HENDRY RUIZ

No. 8412SC1305

(Filed 15 October 1985)

1. Criminal Law § 73.4— hearsay statements—admissible as excited utterance

There was no error in a prosecution for conspiring to traffic in a controlled substance and trafficking in a controlled substance where one of the arresting officers testified that defendant was driven back to his home to make arrangements for the care of his children, that a woman there became excited and said to defendant when he and two officers walked in, "I told you not to go. I told you not to do it that you would get in trouble, you would get caught." The evidence was clearly a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. G.S. 8C-1, Rule 803.

2. Criminal Law § 69— tape recording of telephone conversation—admitted—no error

The trial court did not err in a prosecution for conspiring to traffic in cocaine and trafficking in a controlled substance by possession where the court permitted a tape recording of a conversation between an informant and defendant to be played to the jury and required defendant to give a voice exemplar by reading from a transcript of the tape the lines spoken by a voice that sounded like his where defendant denied taking part in any telephone conversation about a drug transaction. The tape and defendant's reading were used for impeachment during cross-examination; moreover, testimony elicited by the State during rebuttal substantially completed authentication of the

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tape, except for identifying defendant's voice, which was left to the jury. G.S. 8C-1, Rule 611(b), G.S. 8C-1, Rule 901.

3. Criminal Law § 138—conspiring to traffic in a controlled substance—trafficking in a controlled substance by possession—sentence of two consecutive seven year prison terms—no error

The trial court did not err when sentencing defendant to two consecutive seven year terms for conspiring to traffic in cocaine and trafficking in a controlled substance by possession, even though those sentences exceed the presumptive terms for Class G felonies, because G.S. 90-95(h)(3)a and G.S. 90-95(i) provide that a person convicted of trafficking or conspiracy to traffic in cocaine in an amount between 28 and 200 grams shall be sentenced to a term of at least seven years. G.S. 15A-1340.4(f).

APPEAL by defendant from *Herring, Judge*. Judgment entered 2 August 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 29 August 1985.

Defendant was charged with and convicted of conspiring to traffic in a controlled substance (cocaine) and trafficking in a controlled substance by possession. The charges stemmed from a transaction that occurred on 15 March 1983, whereby agents of the City-County Bureau of Narcotics arranged through a police informant, Ahmer Ali Quershi, to purchase cocaine from defendant and another individual. While Quershi waited in his car in the parking lot of a shopping mall a red Toyota automobile pulled up and a passenger from that car got in Quershi's car, and then drove away. On a pre-arranged signal from Quershi law enforcement officers approached the car, arrested Renaldo Torna and seized two ounces of cocaine from him. On information from Torna the officers traced the red Toyota to a trailer home in Fayetteville and arrested the two men they found there, one of whom was defendant. Torna turned State's evidence and testified that he and defendant agreed to traffic in the cocaine and that defendant was driving the red Toyota. Defendant, testifying in his own behalf, claimed that he did not know about the cocaine and only drove the car at Torna's request.

Attorney General Thornburg, by Assistant Attorney General William N. Farrell, Jr., for the State.

James R. Parish for defendant appellant.

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PHILLIPS, Judge.

[1] At trial, one of the arresting officers testified over defendant's objection that defendant was driven back to his home to make arrangements for the care of his children. When he and two officers walked in, a woman in the room, presumed by the witness to be defendant's girlfriend, became excited and said to defendant, "I told you not to go. I told you not to do it that you would get in trouble, you would get caught." Defendant contends that it was error to receive this testimony because it was hearsay and the declarant was neither identified nor offered as a witness by the State. We disagree. Under the provisions of G.S. 8C-1, Rule 803, an "excited utterance," defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is not excluded by the hearsay rule. The evidence involved was clearly such an utterance, and the court did not err in receiving it. Such utterances were also admissible under court developed rules before the present rules of evidence were enacted. *See*, 1 Brandis N.C. Evidence Sec. 164 (1982).

[2] On cross-examination by the State, defendant denied making certain statements in a telephone conversation with the informant Quershi in which the cocaine transaction involved was allegedly arranged, and the State offered to play a tape recording of the conversation. Before permitting the tape to be run the court held a *voir dire* to determine only whether the tape could be used to impeach defendant's testimony, and no inquiry was made as to the tape's authenticity. After hearing the tape, the court allowed it to be played twice in its entirety for the jury. Cross-examined about it defendant conceded that the voices on the tape sounded like his and Quershi's, but denied taking part in any telephone conversation about a drug transaction. He was then required, over objection, to give a voice exemplar for the jury by reading from a transcript of the tape the lines spoken by the voice that sounded like his. He contends that permitting the tape and the transcript to be used in this manner was error because the tape had not been authenticated, as *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971) and *State v. Shook*, 55 N.C. App. 364, 285 S.E. 2d 328 (1982) require. These decisions stand for the proposition that before a recorded statement can be received as substantive evidence, it must be authenticated. But at the time complained of

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the tape and defendant's reading were not used for substantive purposes. They were used for impeachment during cross-examination, and "[a] witness may be cross-examined on any matter relevant to any issue in the case, *including credibility*," G.S. 8C-1, Rule 611(b) (emphasis added). That a witness's credibility can be affected by evidence of prior inconsistent statements has been recognized since the earliest days of our jurisprudence. *Murphy v. McNeil*, 19 N.C. 244 (1837). And the voice exemplar had the further purpose of identifying defendant as the person who made the prior inconsistent statement. See *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978); *State v. Coleman*, 270 N.C. 357, 154 S.E. 2d 485 (1967); 1 Brandis, *supra* Secs. 38, 46.

On rebuttal, the State elicited testimony from one of the investigating officers to the effect that: He was with Quershi when the taped conversation took place and recorded it; the tape played in court was a tape of that conversation and one of the voices recorded was Quershi's; the tape had not been altered or tampered with since the conversation was recorded and he had had custody of the tape ever since. The officer was not allowed to identify the other voice on the tape since the jurors, who had heard the tape and heard defendant testify and give the voice exemplar, were as well qualified to make that determination as the officer was. The tape was then admitted into evidence over defendant's objection that it had not been authenticated. The State's argument that the tape and testimony were limited to impeachment purposes is without merit. No limiting instructions were either requested or given. Under the circumstances, therefore, it would have been appropriate for the court to conduct a *voir dire* to determine the tape's authenticity. *State v. Lynch, supra*; see generally, 2 Brandis N.C. Evidence Sec. 195 (1982). But G.S. 8C-1, Rule 901, states that the requirement of authenticity "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims"; and in our opinion the testimony of the State's rebuttal witness substantially completed the authentication of the tape, except for identifying the defendant's voice, which was wisely left for the jury to determine, since they had heard the tape, the testimony of defendant and Quershi about it, and defendant's voice exemplar. Under the peculiar circumstances that developed, if the failure to formally complete the authenticity process was error, it was harmless.

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[3] Though no aggravating factors were found the court sentenced defendant to two consecutive seven year prison terms. These sentences exceed the presumptive terms for Class G felonies, but they do not violate the Fair Sentencing Act, as defendant contends. This is because the presumptive terms set forth in G.S. 15A-1340.4(f) do not apply where the sentence for an offense is otherwise specified by statute; and G.S. 90-95(h)(3)a and G.S. 90-95(i) provide that a person convicted of trafficking or conspiracy to traffic in cocaine in an amount between 28 and 200 grams, as happened here, "*shall* be sentenced to a term of at least seven years." (Emphasis added.)

No error.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL GREEN

No. 8514SC34

(Filed 15 October 1985)

1. Automobiles and Other Vehicles § 112.2— speed of automobile—opportunity for observation

A witness in a manslaughter prosecution had a sufficient opportunity to observe defendant's automobile to permit him to testify that it was traveling forty to forty-five miles per hour when it swerved toward the witness and deceased and struck deceased where the witness testified that he had noticed the car when it was twenty to thirty feet away. Defendant's contention that the darkness of night prevented an opportunity for observation goes to the weight rather than to the admissibility of such testimony.

2. Criminal Law § 101.4— refusal to furnish transcript to jury—no abuse of discretion

The trial court did not abuse its discretion in refusing the jury's request to have a transcript of the trial where the court indicated that a transcript was not yet available and explained that the jury was to base its decision on its recollection of the evidence. The trial court's statement, "This is the best I can do for you," did not constitute a refusal to exercise its discretion as to whether a transcript should be provided.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 14 June 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 September 1985.

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Defendant was convicted of involuntary manslaughter and hit and run causing death. G.S. 14-18; G.S. 20-166(a). Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James Wallace, Jr., for the State.

Romallus O. Murphy, for defendant appellant.

JOHNSON, Judge.

[1] Defendant assigns as error the trial court's allowance of the opinion testimony by Mr. Shaun Bannon with respect to the speed the vehicle was traveling at the time of the accident. The basis for defendant's assignment of error is that the witness had no basis on which to form a legally competent opinion as to the speed of defendant's car. We disagree.

On 4 February 1984, the deceased, Karen Elizabeth Dudley, left a party to retrieve some cassette tapes from an automobile parked some distance from the party. Shaun Bannon accompanied Ms. Dudley, walking with her single file in a southerly direction in the northbound lane of travel facing traffic. Shaun Bannon testified that a car traveling approximately forty (40) to forty-five (45) miles per hour erratically swerved toward them. Shaun Bannon further testified that he had noticed the car twenty (20) to thirty (30) feet away, and that it was over towards the middle of the road. The vehicle swerved and struck Ms. Dudley. Mr. Bannon was able to step out of the way of the oncoming vehicle. Ms. Dudley suffered compound fractures and severe brain trauma with death resulting from the injuries. The information provided by Mr. Bannon and the green paint stains on the clothing of Ms. Dudley led to the arrest of defendant.

Expert testimony linked defendant's car with the accident which killed Ms. Dudley. Defendant denied involvement with the hit and run accident. Testimony of various witnesses established that defendant had consumed vodka at the residence of Mr. Willie Vine on 4 February 1984 and that he appeared high, drunk, tired or sleepy.

The conflict between the State's witnesses and defendant's witnesses revolves around the time defendant left the residence of Mr. Willie Vine. Defendant and other witnesses contend that

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he left around 11:00 p.m. and arrived home around 11:20 p.m. that evening. The State's witnesses said defendant left Mr. Vine's home at approximately 10:00 p.m. and arrived home around 11:00 p.m.

It is well settled that a lay witness may testify as to his opinion about the speed of a moving vehicle. *Lookabill v. Regan*, 247 N.C. 199, 100 S.E. 2d 521 (1957). The prerequisite to such testimony is that there was an opportunity to see the event being testified about. *Id.*

Defendant contends that the witness was unable to observe the speed of the oncoming vehicle that was twenty (20) to thirty (30) feet away. The witness in *Regan* was in a moving vehicle, yet was held competent to testify about an oncoming vehicle's rate of speed. *Id.* at 201, 100 S.E. 2d at 522. The witness in the case *sub judice* testified that his attention was focused on the vehicle as a response to the vehicle's swerve toward him. The ability of the witness to accurately determine the speed is a question of credibility rather than a question of admissibility. *Smith v. Stocks*, 54 N.C. App. 393, 283 S.E. 2d 819 (1981).

As long as the time and distance of the observation enable the witness to do more than hazard a guess, the testimony is admissible. *Id.* Defendant also contends that the darkness of the night prevented an opportunity for observation. This contention goes to the weight of the evidence and does not make it inadmissible. We, therefore, conclude the opinion testimony with respect to the speed of the vehicle was properly admitted.

Defendant's second assignment of error is that the court erred by not granting his motion for nonsuit. His argument is premised on the inadmissibility of the opinion testimony with respect to the speed of defendant's vehicle. The State relied on the opinion testimony to buttress its case on involuntary manslaughter. Without such testimony, defendant contends that his motion for nonsuit should have been granted. Consistent with our discussion above we find defendant's assignment of error without merit.

[2] Finally, defendant contends the trial court erred in refusing to have portions of the evidence read to the jury. During the jury's deliberation the foreman requested a transcript of the trial.

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The response given by the trial judge indicated that a transcript was not yet available. Moreover, the judge explained that the jury was to base its decision on the recollection of those twelve (12) jurors as to what the facts were. A review of the evidence and testimony by the jury is in the discretion of the trial court. G.S. 15A-1233. The wrongful denial of a jury request for a review of the evidence should be corrected by an appellate court when there is an abuse of discretion resulting in prejudicial error. *State v. Taylor*, 56 N.C. App. 113, 287 S.E. 2d 129 (1982).

Defendant argues that the judge refused to exercise his discretion. We disagree. Defendant failed to object at the time, nonetheless, we review the merits of his argument. Rule 10(b)(2), N.C. Rules App. P. The judge explained at length his reasoning for not providing a transcript to the jury. Defendant assigns as error the following statement: "This is the best I can do for you." The trial judge was expressing his belief that the explanation provided was the best possible. Defendant would assert that this statement is a refusal to exercise discretion. *See State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980). The refusal in *Lang* was premised on the trial judge's erroneous belief that the judge did not have the authority to provide a transcript to the jury. *Id.* In the case *sub judice* the trial judge recognized that he did have the authority to provide a transcript, but in his discretion the jury's request was denied and the jury was instructed to rely upon its own recollection of the evidence. Moreover, we conclude there was no prejudice such that a different result would have been reached.

No error.

Judges EAGLES and PARKER concur.

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STATE OF NORTH CAROLINA v. JEFFREY TYRONE McCULLERS

No. 8511SC126

(Filed 15 October 1985)

1. Criminal Law § 112.1— refusal to give requested instruction on reasonable doubt

The trial court did not err in refusing to give defendant's requested instruction on reasonable doubt where the instruction given was substantially as requested by defendant and was in all regards a proper, correct and true instruction on the meaning of reasonable doubt.

2. Robbery § 5.4— armed robbery case—instruction on misdemeanor larceny not required

The evidence in an armed robbery prosecution did not require an instruction on misdemeanor larceny where all the evidence tended to show that the taking of money from a store was occasioned by the violent act of defendant in striking the owner over the head with a soft drink bottle and that when the money was taken from a cash register the owner was crawling toward another section of the store counter.

3. Criminal Law § 113.1— impeaching evidence favorable to defendant— failure to summarize

The trial court did not err in failing to summarize evidence favorable to defendant which tended only to impeach the State's witnesses and did not go to the establishment of a substantive defense.

4. Criminal Law § 138— aggravating factor—prior convictions—crimes committed after crime for which sentence imposed

As used in G.S. 15A-1340.4, "prior conviction" means one that is obtained before defendant is sentenced for another offense. Therefore, two prior convictions for uttering forged paper could be used to aggravate sentences imposed for robbery and assault even though the uttering offenses occurred after the robbery and assault.

5. Criminal Law § 138— same factors aggravating two convictions

The same factors may properly be used to aggravate more than one conviction.

APPEAL by defendant from *Martin (John C.)*, Judge. Judgments entered 26 January 1984 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 23 September 1985.

Defendant was charged in proper bills of indictment with robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. The State proceeded to trial on the charges of robbery with a dangerous weapon and

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assault with a deadly weapon inflicting serious injury. At trial the State offered evidence tending to show the following:

On 23 October 1983 a lone black male entered a store in Selma, North Carolina, owned by H. B. Jernigan and ordered a can of beer. As Mr. Jernigan went to get the beer, he was struck in the head with a soft drink bottle, causing serious injury. The assailant then took "about thirty dollars" from the cash register and fled from the store. Mr. Jernigan testified that defendant was the man who attacked him. Another witness testified that defendant was the man she had seen run out of the store. Defendant was arrested within two hours of the incident. He allegedly admitted to a State Bureau of Investigation agent that he hit the victim with a soft drink bottle and had intended to rob the store, but that he had become frightened and left before taking any money. Defendant offered no evidence at the trial.

Defendant was found guilty of common law robbery and assault with a deadly weapon inflicting serious injury and appealed from judgment imposing consecutive ten year sentences.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Narron, O'Hale, Whittington & Woodruff, by John P. O'Hale, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to the definition of "reasonable doubt" used in the court's charge to the jury. The instruction prepared by defendant was not used, and he now argues that the instruction given to the jury did not conform to his requested instruction and that it erroneously placed upon defendant the burden of establishing the existence of a reasonable doubt. A trial judge is not required to give an instruction exactly as requested, but is merely required to give a correct instruction of the applicable law. *State v. Monk*, 291 N.C. 37, 54, 229 S.E. 2d 163, 174 (1976). The record in the present case reveals that the instruction given to the jury was substantially as requested by defendant, and was in all regards a proper, correct, and true instruction on the meaning of reasonable doubt. This assignment of error is without merit.

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[2] Defendant next assigns error to the court's failure to instruct the jury on the lesser included offense of misdemeanor larceny. Defendant contends that the evidence favorable to him established the elements of the offense of misdemeanor larceny, and that the court's failure to charge the jury on this offense was, therefore, prejudicial error. Defendant's claims that the evidence shows 1) "that the larceny took place . . . out of the presence of the victim" and 2) "that the larceny itself was not occasioned by the violent acts of the defendant" are wholly unsupported by the evidence. All of the evidence tends to show that the taking of the money was "occasioned by the violent acts of the defendant," namely striking the victim over the head with a soft drink bottle. The evidence also tends to show that when the money was taken from the cash register the victim was crawling toward another section of the store counter. There is absolutely no evidence in the record to support the giving of an instruction on misdemeanor larceny. This assignment of error is without merit.

[3] Defendant next argues that "the trial court erred in failing to summarize evidence favorable to the defendant during the court's charge to the jury." In his brief defendant relies heavily upon *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979), *cert. denied*, 454 U.S. 973, 102 S.Ct. 523, 70 L.Ed. 2d 392 (1981), to support his contention that evidence favorable to a defendant must be summarized if the court summarized the State's evidence. Defendant fails to note, however, that our Supreme Court has held that "while a trial judge must summarize evidence favorable to defendant which is brought out on cross-examination, there is no requirement that this be done when the evidence goes not to the establishment of a substantive defense but rather is of an impeaching quality and effect." *State v. McDowell*, 301 N.C. 279, 292, 271 S.E. 2d 286, 295 (1980).

In the present case all of the evidence which defendant contends should have been summarized tends to impeach the State's witnesses. As such it was not error for the trial court to refuse to summarize it during the charge to the jury. This assignment of error is without merit.

[4] Defendant's final assignment of error alleges two violations of the Fair Sentencing Act, G.S. 15A-1340.4. Defendant first contends that his two convictions for uttering forged paper could not

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be used to aggravate the sentences given in the present case. Because these convictions were obtained in December 1983, more than one month after the incident at Mr. Jernigan's store, defendant claims that they are not "prior convictions" under G.S. 15A-1340.4. This argument is totally baseless. The statute contains no language to support defendant's argument that the legislature intended to define "prior conviction" as a conviction obtained before a later offense was committed. We believe that a fair reading of the statute defines "prior conviction" as one that is obtained before the defendant is sentenced for another offense. Since the record clearly shows that defendant had two prior convictions for uttering forged papers, those convictions were properly used to support the aggravating factor found by the trial judge.

[5] Defendant also contends that it was error for the trial court to consider the same factors in aggravation of both sentences. No appellate court in this State has ever held that the same factor may not be used to aggravate more than one conviction, and we decline defendant's invitation to adopt such a principle. This assignment of error is without merit.

No error.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. STEVEN T. MILLER

No. 842SC1199

(Filed 15 October 1985)

1. Divorce and Alimony § 24.4— enforcement of child support order—contempt—improper

The trial court's findings were insufficient to support an order imprisoning defendant unless he paid \$40 each week on a child support arrearage where the court found that defendant was totally disabled because of a work related spinal cord injury; that his only income was a weekly workers' compensation payment; that he required frequent medical attention by a neurologist in Greenville and by an orthopedist and urologist at Duke University Medical Center; that defendant's expenses included transportation, primarily cab fare; and that defendant did not own a car and lived alone. The record did not show

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that defendant was capable of paying \$40 a week into court because, while the court's findings showed that defendant had \$45 left from his weekly benefits check after paying bills for rent, utilities, and groceries, they did not show what his transportation and other necessary expenses were. G.S. 5A-21.

2. Divorce and Alimony § 24; Master and Servant § 79.1 — workers' compensation — not exempt from child support obligation

The obligation to support one's children is not a debt in the legal sense of the word and a court was not forbidden by G.S. 97-21 from requiring defendant to pay child support out of his workers' compensation benefits.

APPEAL by defendant from *Horner, Judge*. Order entered 13 August 1984 in District Court, BEAUFORT County. Heard in the Court of Appeals 27 August 1985.

Attorney General Thornburg, by Assistant Attorney General Clifton H. Duke, for the State.

Franklin B. Johnston for defendant appellant.

PHILLIPS, Judge.

In July 1981 in the District Court of Beaufort County defendant was convicted of failing to support his illegitimate child and his seven months prison sentence was suspended on condition that he pay \$25 each week toward the child's support. The amount of the weekly payments was later reduced to \$15. In August 1984 when defendant was admittedly \$2,485 behind on the payments, he was found in contempt of the support order and was committed to jail, with the proviso that he can purge himself of the contempt by paying \$40 into court each week until the arrearage is discharged. In substance, the court's findings of fact were that: Defendant is totally disabled because of a work-related spinal cord injury and his only income is a weekly workers' compensation payment in the amount of \$133; because of his injury he is unable to control his kidneys and bowels, often has blisters on his legs and buttocks, and requires frequent medical attention by his neurologist in Greenville and by his orthopedist and urologist at Duke University Medical Center in Durham, where multiple surgery is planned; defendant's weekly expenses are \$37.50 for rent, \$15.00 for utilities and \$35.00 for groceries; and "the defendant has transportation expenses, primarily for cab fare, in that the defendant does not own a car and lives alone."

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[1] Defendant's contention that the findings made do not support the order imprisoning him unless he hereafter pays \$40 each week on the arrearage is well taken. Since the manifest purpose of the order appealed from is to coerce defendant into complying with the previous order of the court, it is an order of civil contempt. G.S. 5A-21; *Brower v. Brower*, 70 N.C. App. 131, 318 S.E. 2d 542 (1984). Before a previous order of child support can be enforced by civil imprisonment which can be avoided by paying money it must first appear that the defendant is capable of making the payments required. *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E. 2d 786 (1980). The record here does not show that defendant is capable of paying \$40 a week into court. While the court's findings show that defendant has \$45 left from his weekly benefits check after paying his bills for rent, utilities and groceries, they do not show what his transportation and other necessary expenses amount to; and under the circumstances recorded we cannot assume that these expenses amount to \$5 or less each week. Though the court found that defendant must hire others, usually a taxi, to take him wherever he has to go, it did not find how much transportation he requires or what it costs. The expense of hiring someone just to take him to the offices of the several doctors that treat him, two of whom are situated more than a hundred miles from Greenville where he now lives, could be considerable; as could the weekly cost of taking him to the grocery store, drug store, barber shop, laundry, bank and other places that he has to go. Nor did the court make any finding as to the cost of defendant's other necessary living expenses—for clothing, laundry, dry cleaning, medicine, toilet articles, etc. We therefore vacate the order appealed from and remand the matter to the District Court for a hearing *de novo* on the motion involved.

[2] But we reject defendant's further contention that requiring him to pay child support out of his workers' compensation benefits is forbidden by G.S. 97-21. This statute, in pertinent part, provides that "[n]o claim for compensation under this Article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes." The obligation to support one's children is not a "debt" in the legal sense of the word, *Ritchie v. White*, 225 N.C. 450, 35 S.E. 2d 414 (1945), and leaving aside the other circumstances that must be considered a parent's duty to support his children is not measured by the

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source of his means or income, but their extent. Too, helping to sustain the dependents of employees disabled on the job is one of the main purposes of our Workers' Compensation Act.

Vacated and remanded.

Judges WELLS and WHICHARD concur.

IN RE: LEONARD, A MINOR CHILD

No. 8519DC43

(Filed 15 October 1985)

**Parent and Child § 1.5— petition to terminate parental rights— child living in Ohio
when petition filed— absence of jurisdiction**

A child was not "residing in" or "found in" the district "at the time of filing" of a petition to terminate parental rights so as to give the district court jurisdiction under G.S. 7A-289.23 to determine the petition where the child had moved to Ohio with its mother four days before the petition was filed.

APPEAL by respondent from *van Noppen, Judge*. Judgment entered 20 December 1984 in RANDOLPH County District Court. Heard in the Court of Appeals 27 August 1985.

This case arises out of a petition to terminate the parental rights of Darrel Leonard as to his son, Michael Leonard. The petition was filed 19 June 1984 in Randolph County. At the hearing, the petitioner Rita McMasters Leonard testified that she married David Avery on 10 June 1984. On 15 June 1984, she left North Carolina with the child to join her new husband in Ohio while he completed a two-year course of schooling. She did not know where they would move after her husband completed his studies.

Respondent moved to dismiss on the ground that the court lacked jurisdiction to hear the petition under N.C. Gen. Stat. § 7A-289.23 (Cum. Supp. 1983). Judge van Noppen denied the motion and heard the grounds for termination. The order granting termination of Darrel Leonard's parental rights was entered 20 December 1984.

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Beck, O'Briant and O'Briant, by Lillian B. O'Briant for petitioner-appellee.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for respondent-appellant.

WELLS, Judge.

The sole issue before this Court is interpretation of the termination of parental rights jurisdictional statute, N.C. Gen. Stat. § 7A-289.23 (Cum. Supp. 1983). The pertinent language follows:

The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition. . . .

Respondent contends that, since the mother left with the child for Ohio four days before the petition was filed, the child was not "residing in" or "found in" the district "at the time of filing" and therefore the petition should fail for lack of subject matter jurisdiction. We agree and vacate.

A statute must be construed as it is written unless a literal interpretation leads to an absurd result. [Citations omitted.] When the language is clear and unambiguous the courts must give the statute its plain and definite meaning. We are powerless to interpolate, or superimpose, provisions or limitations not contained therein. [Citations omitted.]

Piland v. Piland, 24 N.C. App. 653, 211 S.E. 2d 844, cert. denied, 286 N.C. 723, 213 S.E. 2d 723 (1975). See also *Evans v. Roberson*, slip op. No. 489A84 (N.C. Aug. 13, 1985). The legislature chose to use the phrases "resides in" and "is found in" and upon these phrases we must base our interpretation. "Residence" and "domicile" have been held to be synonymous; but generally "residence" indicates the person's actual place of abode, whether permanent or temporary, and "domicile" indicates the person's permanent home to which, when absent, he intends to return. Residence is a prerequisite to establishing a domicile, and not vice versa. See *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E. 2d 52 (1972). Therefore, it is simpler to establish a change of residence than a

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change of domicile. We hold that, by moving to Ohio, petitioner's actions were effective to change Michael's residence to one outside the court's jurisdiction.

Usually, words of a statute will be given their natural, approved and recognized meaning. *Black v. Littlejohn*, 312 N.C. 626, 325 S.E. 2d 469 (1985). A person is said to be "found" within a state for purposes of service of process when actually present therein. *Black's Law Dictionary* 590-91 (5th ed. 1979). It seems clear that at the time this action was instituted, Michael was not to be found in North Carolina; therefore, the court below did not have subject-matter jurisdiction to determine respondent's parental rights based on the statutory criteria.

Petitioner contends that the codified legislative intent of Article 24B (Termination of Parental Rights) should serve to expand our reading of the statutes therein.

This Article shall not be used to circumvent the provisions of Chapter 50A, The Uniform Child Custody Jurisdiction Act.

N.C. Gen. Stat. § 7A-289.22(4) (1981). Before determining parental rights, the court must find under G.S. § 50A-3 that it has jurisdiction to make a child custody determination. G.S. § 7A-289.23. The court concluded that it would have jurisdiction to determine Michael Leonard's custody under G.S. § 50A-3 and this conclusion has not been contested. While a determination of jurisdiction over child custody matters will precede a determination of jurisdiction over parental rights, it does not *supplant* the parental rights proceedings. The language of the statute is that it shall not be "used to circumvent" Chapter 50A, not that it shall "be in conformity with" Chapter 50A.

The result in this case is not absurd, but it is nonetheless unfortunate. Though residence or physical presence of the child in the district at the time of filing is some indication of the child's connections with the state, the requirement is too easily overcome by a visit to the district on the filing date. In this case it is undisputed that virtually all of Michael Leonard's young life was spent in this state and witnesses who know the family members and other sources of evidence of the relationship with his father are here. In addition, respondent would surely be disadvantaged if his parental rights would be challenged in Ohio.

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Despite these concerns, the legislature has amended G.S. § 7A-289.23 four times since its original passage and has not seen fit to alter the words that grant jurisdiction. The wisdom of the enactment, and the power to change or alter, is exclusively the concern of the legislature. *Piland v. Piland, supra*.

Vacated and remanded for order dismissing the petition.

Judges WHICHARD and PHILLIPS concur.

DIXIE WHITEHURST EVERETTE v. JOSEPH JUNIOR TAYLOR

No. 853SC163

(Filed 15 October 1985)

Injunctions § 12.2— hearing to continue T.R.O.—permanent injunction granted—error

The trial court erred in an action arising from the attempted execution of a default judgment by granting a permanent injunction against proceeding under the judgment at a hearing on whether to extend a temporary restraining order. A permanent injunction may only be issued after a full consideration on the merit of the issues and a judge conducting a hearing to determine whether a temporary restraining order should be continued as a preliminary injunction has no jurisdiction to determine a controversy on its merits; moreover, jurisdiction cannot be conferred by consent of the parties. G.S. 1A-1, Rule 65.

APPEAL by plaintiff from *Reid, Judge*. Order entered 21 November 1984 in Superior Court, PITT County. Heard in the Court of Appeals 24 September 1985.

On 14 November 1979, the plaintiff was a passenger in an automobile operated by her husband when an accident occurred on Highway 903 south of Scotland Neck in Halifax County. The other vehicle involved in the collision was a 1972 Ford truck operated by an elderly man. According to the accident report and a citation given at the scene the driver of the truck was a sixty-six year old man named Joseph Junior Taylor.

On 27 August 1981, the plaintiff brought this action seeking to recover for damages suffered as a result of the accident. The original summons was returned unserved with a notation that Jo-

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seph Junior Taylor was in prison in Raleigh. In November 1981, an alias and pluries summons was issued with more specific directions as to how to find the defendant. This summons was returned with an indication that it had been served by personally delivering a copy to the defendant. No answer was filed, and on 9 April 1982 an entry of default was made. On 12 May 1982, a judgment for \$27,413.27 was entered in favor of the plaintiff.

On 22 February 1984, the plaintiff caused a Notice of Rights to Have Exemption Designated to be served upon the defendant. On 22 March counsel for Joseph Taylor requested a hearing. A hearing date was set but Joseph Taylor failed to appear, and all of his property was declared subject to execution. On 12 September an execution was issued, and on 16 October the Sheriff caused to be posted a Notice of Execution Sale for approximately 90 acres of land owned by Joseph Taylor.

On 15 November 1984, Joseph Taylor obtained a temporary restraining order prohibiting the sale. A hearing on an injunction was set for one week later. At the hearing Joseph Taylor admitted that he was the person involved in the accident, but stated that his name was not Joseph Junior Taylor but Joseph Lee Taylor. He further offered evidence that his son who was in prison in Raleigh was named Joseph Junior Taylor. He stated that he was not educated and when he received the papers addressed to Joseph Junior Taylor he sent them to his son in prison because he thought they were his. He also stated that he told the plaintiff's investigator that his name was Joseph Lee Taylor. The plaintiff offered into evidence the accident report and testimony tending to show that all the papers had been served upon the elder Mr. Taylor.

At the close of the hearing the trial court issued an order "forever enjoining . . . the plaintiff in this action . . . from executing or foreclosing on the ninety (90) acre farm owned by Joseph Lee Taylor . . ." because of the judgment in that action in which Joseph Junior Taylor was named as a defendant. From this order, plaintiff appealed.

Battle, Winslow, Scott & Wiley, by Robert L. Spencer and V. Elaine Cohoon, for plaintiff-appellant.

Howard, Browning, Sams & Poole, by Myron T. Hill, Jr., for defendant-appellee.

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ARNOLD, Judge.

The plaintiff first contends the court erred in granting a permanent injunction when the only matter before the court was a hearing on whether to extend the temporary restraining order. We agree and vacate the permanent injunction.

It is apparent from the court's order that it has finally and absolutely determined adversely to plaintiff the issue regarding whether proper service was obtained against Joseph Taylor and the issue whether plaintiff should be barred from proceeding under this judgment against the person who admitted he caused the accident in question. A permanent injunction may only be issued after a full consideration of the merits of these issues. A judge conducting a hearing to determine whether a temporary restraining order should be continued as a preliminary injunction pursuant to Rule 65 of the Rules of Civil Procedure has no jurisdiction to determine a controversy on its merits. *Shishko v. Whitley*, 64 N.C. App. 668, 308 S.E. 2d 448 (1983). See also *Patterson v. Hosier Mills*, 214 N.C. 806, 200 S.E. 906 (1939). Neither can the parties to an action confer this jurisdiction upon the trial court by granting consent to such a hearing. *MacRae & Co. v. Shew*, 220 N.C. 516, 17 S.E. 2d 664 (1941). Thus, it was error for the court to issue a permanent injunction at a hearing to show cause why a temporary restraining order should not be continued. *MacRae & Co. v. Shew*, 220 N.C. 516, 17 S.E. 2d 664 (1941). Because of this error, the order appealed from is vacated and the case is remanded to the trial court.

Vacated and remanded.

Judges WELLS and MARTIN concur.

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JOHN BAKER v. JOHNNIE LEE COX, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JAMES GRAHAM (REVEREND JAMES A. GRAHAM) AND FIRST AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION

No. 858SC195

(Filed 15 October 1985)

Trusts § 9— Totten trust—revocation by attorney in fact

Judgment was correctly granted for defendant executor and attorney in fact in an action by a beneficiary to recover funds deposited in a tentative trust where the funds were withdrawn from the bank account by the attorney in fact before the death of the depositor. Tentative trusts in savings and loan associations created pursuant to G.S. 54B-130 may be revoked to the extent that funds are withdrawn by a holder of a general power of attorney before the death of the trustee of the trust account.

APPEAL by plaintiff from *Barefoot, Judge*. Judgment entered 25 October 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 25 September 1985.

Plaintiff, John Baker, sued to recover funds deposited by James Graham in defendant Savings and Loan Association under the savings account name of James Graham in Trust for Vance Roberson and John Baker. At the time he created the account, James Graham signed a "Discretionary Revocable Trust Agreement" with the Savings and Loan Association. On 27 August 1981, the \$34,969.20 held in this account was withdrawn by defendant Johnnie Lee Cox acting under a power of attorney executed by James Graham. The power of attorney stated as follows:

[I] appoint my grandson, JOHNNIE LEE COX, of 609 E. Highland Avenue, Kinston, North Carolina my true and lawful attorney-in-fact for me and in my name and stead to carry on all of my business activities in as full and ample a manner as if done by me personally. By way of example, but not in limitation thereof, my said attorney-in-fact is authorized to draw checks on my checking account at Branch Banking & Trust Company or any other financial institution with which I do business, and is authorized to make deposits to said account of any checks payable to me including my Social Security or any other monies owed to me. My said attorney-in-fact is also authorized to pay any bills owed by me or collect any debts owed to me. . . . This power of attorney is executed

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pursuant to the provisions of *N.C.G.S. 47-115.1*, and shall continue in effect notwithstanding any future incapacity or incompetence of the undersigned. . . .

On 10 September 1981 James Graham died. From judgment for the defendants, plaintiff appealed.

Harrison and Heath, by Fred W. Harrison, for plaintiff, appellant.

Joretta Durant for defendant, appellee Johnnie Lee Cox.

Allen, Hooten & Hodges, P.A., by John M. Martin for defendant, appellee First American Federal Savings & Loan Association.

HEDRICK, Chief Judge.

Plaintiff calls upon us to determine the validity of a tentative or "Totten" trust in North Carolina. In jurisdictions which recognized them, tentative trusts are created when a deposit is made by the depositor in his own name in trust for another. *See In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904). The parties to this action cite *Wescott v. Bank*, 227 N.C. 39, 40 S.E. 2d 461 (1946); *Ridge v. Bright*, 244 N.C. 345, 93 S.E. 2d 607 (1956); *Sinclair v. Travis*, 231 N.C. 345, 57 S.E. 2d 394 (1950); *Kyle v. Groce*, 50 N.C. App. 204, 272 S.E. 2d 609 (1980); *Baxter v. Jones*, 14 N.C. App. 296, 188 S.E. 2d 622, *cert. denied*, 281 N.C. 621, 190 S.E. 2d 465 (1972); *Williams v. Mullen*, 31 N.C. App. 41, 228 S.E. 2d 512 (1976); and *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904) in discussing the validity of tentative trusts in North Carolina. Since 1 May 1981, the validity of tentative trusts in savings and loan associations has been controlled by N.C. Gen. Stat. Sec. 54B-130 which provides in pertinent part:

(a) If any one or more persons holding or opening a withdrawable account shall execute a written agreement with the association, providing for the account to be held in the name of such person or persons as trustee or trustees for one or more persons designated as beneficiaries, the account and any balance thereof shall be held as a trust account, and unless otherwise agreed upon between the trustees and the association:

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(1) Any such trustee during his lifetime may change any designated beneficiaries by a written direction to the association; and

(2) Any such trustee may withdraw or receive payment in cash or check payable to his personal order, and such payment or withdrawal shall constitute a revocation of the agreement as to the amount withdrawn; and

(3) Upon the death of the surviving trustee, the person or persons designated as beneficiaries who are living at the death of the surviving trustee shall be the holder or holders of the account, as joint owners with right of survivorship if more than one, and payment by the association to the holder or any of them shall be a total discharge of the association's obligation as to the amount paid.

James Graham executed the required written agreement with the defendant Savings & Loan Association and, therefore, a valid tentative trust was created pursuant to N.C. Gen. Stat. Sec. 54B-130.

Plaintiff argues that the general power of attorney exercised by defendant Cox authorized Cox to transact the business of James Graham but not the business of James Graham trustee for the benefit of Baker and Roberson. Our research reveals no decision of our courts as to whether the holder of a general power of attorney may withdraw money from a tentative trust. However, the special nature of tentative trusts created pursuant to N.C. Gen. Stat. Sec. 54B-130 leads us to conclude that tentative trusts in savings and loan associations created pursuant to N.C. Gen. Stat. Sec. 54B-130 may be revoked to the extent that funds are withdrawn by a holder of a general power of attorney before the death of the trustee of the trust account.

The judgment appealed from is affirmed.

Affirmed.

Judges BECTON and PARKER concur.

Capps v. Standard Trucking Co.

ESMOND H. CAPPS, WIDOW AND GUARDIAN AD LITEM FOR ROBBY WAYNE EVANS, MINOR CHILD; SUSAN WATKINS, GUARDIAN AD LITEM FOR GEORGE F. CAPPS, JR., MINOR CHILD OF GEORGE F. CAPPS, DECEASED EMPLOYEE, PLAINTIFFS v. STANDARD TRUCKING COMPANY, EMPLOYER, ROYAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC32

(Filed 15 October 1985)

Master and Servant § 79.1—stepchild—finding of substantial dependency required for benefits

An award of an equal share of workers' compensation benefits to a stepchild was remanded where the Industrial Commission found only that the stepchild was dependent upon the deceased for support at the time of the death and did not make a finding of substantial dependency. G.S. 97-39, G.S. 97-2(12).

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award of the Full Commission filed 4 September 1984. Heard in the Court of Appeals 26 August 1985.

Clifton & Singer by W. Robert Denning III for the plaintiff appellant, Susan Watkins, Guardian Ad Litem for George F. Capps, Jr., Minor Child of George F. Capps, Employee.

Mast, Tew, Armstrong & Morris by John W. Morris and George B. Mast for the plaintiff appellee, Robby Wayne Evans.

COZORT, Judge.

This appeal concerns whether the deceased employee's stepchild, Robby Wayne Evans, is a "child" of the deceased within the meaning of G.S. 97-2(12) so as to clothe him with the conclusive presumption under G.S. 97-39 that he is "wholly dependent for support upon the deceased employee" and, therefore, entitled to an equal share of the compensation under G.S. 97-38. In light of *Winstead v. Derreberry*, 73 N.C. App. 35, 326 S.E. 2d 66 (1985), we must remand this case for a determination of whether Robby Wayne Evans was "substantially" dependent upon the deceased at the time of his death.

On 31 January 1983 George Franklin Capps, Sr., was driving a transfer truck for Standard Trucking from Raleigh to Wilmington during a Teamster's Union strike when he was fatally wounded by a bullet from a high-powered rifle. Prior to a hearing before

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the Deputy Commissioner the parties stipulated that the deceased-employee's death was compensable under the Worker's Compensation Act at the maximum rate of \$248.00 per week for 400 weeks. The hearing was held to determine who among the plaintiffs should share in the compensation. The plaintiffs represented at the hearing were decedent's widow, Esmond Capps, whom he married in 1981; her son, decedent's stepson, Robby Wayne Evans, who had lived with his mother and decedent at the time of decedent's death; and decedent's natural son, George Franklin Capps, Jr., who lived with his natural mother, decedent's former wife.

After the hearing the Deputy Commissioner concluded that decedent's widow, her son (decedent's stepson), and decedent's natural son were each entitled to an equal share of the compensation. Finding that the stepchild was "dependent" upon the deceased for support at the time of decedent's death, the Full Commission concluded that Robby Wayne Evans is a "child" of the deceased within the meaning of G.S. 97-2(12) and affirmed the result reached by the Deputy Commissioner. The Full Commission's decision was filed on 4 September 1984.

G.S. 97-38 provides that persons who are "*wholly dependent* for support upon the earnings of the deceased employee at the time of the accident" are entitled to share equally, to the exclusion of all others, in the entire compensation payable. [Emphasis added.] G.S. 97-39 provides, that "[a] widow, a widower and/or a *child* shall be conclusively presumed to be wholly dependent for support upon the deceased employee." [Emphasis added.] G.S. 97-2(12) defines "child" as including "a stepchild . . . *dependent* upon the deceased." [Emphasis added.] In *Winstead v. Derberry, supra*, the court held that a stepchild must be factually "substantially" dependent upon the deceased in order to qualify as a "'child' dependent on deceased under G.S. § 97-39 and, therefore, [be] entitled to a share of death benefits under G.S. § 97-38." 73 N.C. App. at 43, 326 S.E. 2d at 72. We are bound by this prior decision.

Here the Full Commission found only that the stepchild was "*dependent* upon the deceased for support at the time of the death." [Emphasis added.] No finding of substantial dependency was made. Therefore, we must remand this case for a determina-

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tion of whether Robby Wayne Evans was substantially dependent for support upon the earnings of the deceased at the time of the death so as to afford him the conclusive presumption under G.S. 97-39 of being "wholly dependent" upon the deceased and, therefore, entitle him to an equal share of death benefits under G.S. 97-38.

Remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

DEBORAH M. BRADLEY, EMPLOYEE-PLAINTIFF v. E. B. SPORTSWEAR, INC.,
EMPLOYER, PENNSYLVANIA NATIONAL MUTUAL INSURANCE COM-
PANY, CARRIER-DEFENDANTS

No. 8510IC121

(Filed 15 October 1985)

1. Master and Servant § 65.2— workers' compensation—back injury—result of specific traumatic incident—compensable

The Industrial Commission did not err by awarding compensation to a plaintiff who injured her back when she squatted down to pick up a box on the floor but had not touched the box when she felt the back pain. By amending G.S. 97-2(6) to say that an accident includes an injury that is "the result of a specific traumatic incident" the General Assembly intended to relax the requirement that there be some unusual circumstance that accompanied the injury; the use of the words "specific" and "incident" means that the trauma or injury must not have developed gradually but must have occurred at a cognizable time.

2. Master and Servant § 65.2— workers' compensation—back injury—arose out of employment

Plaintiff's back injury arose out of her employment where her job required her to carry bundles of cut cloth to sewers and finished products to inspectors and she felt pain in her lower back when she squatted down to pick up a box on the floor. However much plaintiff may have been exposed to potential injury from bending and squatting apart from her employment, her injury occurred while she was working at her assigned duties.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and award entered 15 November 1984. Heard in the Court of Appeals 18 September 1985.

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The defendants appeal from an award to the plaintiff. The parties stipulated that the plaintiff was employed by E. B. Sportswear, Inc. and was subject to the Workers' Compensation Act. Her job required her to carry bundles of cut cloth to sewers and the finished products to inspectors. On 6 January 1984 she bent her knees and "squatted down" to pick up a medium-sized bundle in a box on the floor. As she did so, she felt pain in her right lower back. The plaintiff had not touched the box when she felt the back pain. She was doing her usual type work at the time. The plaintiff was hospitalized for one week and was released to return to work on 12 March 1984.

Deputy Commissioner Ed Turlington entered an opinion and award in which he found facts in accordance with the stipulations of the parties and awarded compensation to the plaintiff. The full Commission affirmed this opinion and award and the defendants appealed.

No counsel for plaintiff appellee.

Hollowell, Stott, Palmer & Windham, by Douglas P. Arthurs and Grady B. Stott, for defendant appellants.

WEBB, Judge.

[1] This case brings to the Court the construction of the second sentence of G.S. 97-2(6) which provides in part:

"Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident. . . .

The second sentence of G.S. 97-2(6) became effective on 20 July 1983. Prior to that time in order for a back injury to be compensable as an accident under the Workers' Compensation Act there had to be some unusual circumstance which caused the injury. See *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E. 2d

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763 (1982). By amending the act to say that an accident includes an injury that is the "result of a specific traumatic incident" we believe the General Assembly intended to relax the requirement that there be some unusual circumstance that accompanied the injury. We believe that the use of the words "specific" and "incident" means that the trauma or injury must not have developed gradually but must have occurred at a cognizable time. This is what the evidence shows happened to the plaintiff in this case.

The defendants argue that to hold as we do means that an injury and a specific traumatic incident are the same, which is not the law. We believe the statute requires us to hold there was evidence to support a finding of a specific traumatic incident in this case. If that is the same as an injury we cannot overrule a statute to hold otherwise.

[2] The defendants also argue that the plaintiff's injury did not arise out of her employment and for this reason it is not compensable. They rely on *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977); *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963); *Lewter v. Abercrombie Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410 (1954); *Bryan v. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751 (1943) for the proposition that "Some risk inherent to the employment must be a contributing proximate cause of the injury and the risk must be enhanced by the employment and one to which the worker would not have been equally exposed apart from the employment." They argue that she is exposed to potential injury from bending and squatting separate and apart from her employment. We believe that the answer to this argument is that however she may be exposed apart from her employment her injury occurred while she was working at her assigned duties. We hold the injury arose out of and was in the course of her employment.

Affirmed.

Judges BECTON and MARTIN concur.

State v. Loudner

STATE OF NORTH CAROLINA v. EDWARD LYNN LOUDNER

No. 8521SC83

(Filed 15 October 1985)

Rape and Allied Offenses § 19— sexual act with person in defendant's custody—variance between indictment and proof

The trial court erred in denying defendant's motion for a directed verdict where the indictment charged that defendant engaged "in a sexual act, to wit: performing oral sex" with a person in his custody, a stepdaughter, in violation of G.S. 14-27.7, but the State's evidence showed only that defendant placed his finger in the child's vagina.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 23 August 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 September 1985.

Attorney General Thornburg, by Assistant Attorney General Jane Rankin Thompson, for the State.

Victor M. Lefkowitz for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of engaging in a sex act with a person in his custody, a stepdaughter, in violation of G.S. 14-27.7, and sentenced to four years in prison. While the indictment in pertinent part alleged that defendant engaged "in a sexual act, to wit: performing oral sex" on the child involved, the State's evidence showed only that the defendant placed his finger in her vagina, which by definition is a separate sex offense under the terms of G.S. 14-27.1(4). This variance between charge and proof is the basis for defendant's contention that the court erred in denying his motion for a directed verdict at the end of all the evidence. This contention is well taken; the defendant has been convicted of a crime he has not been charged with and we reverse the judgment appealed from.

The evidence in a criminal prosecution must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, the defendant's conviction thereof cannot stand. *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981). Since an indictment for a sexual offense need not allege the specific nature

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of the sex act committed, G.S. 15-144.2, the State contends that the words in the indictment defendant was tried under, "to wit: performing oral sex," were superfluous and therefore harmless to defendant. This contention was implicitly rejected by our Supreme Court in *State v. Williams*, *supra* and we reject it here. While the State was not required to allege the specific nature of the sex act in the indictment, *State v. Edwards*, 305 N.C. 378, 289 S.E. 2d 360 (1982), having chosen to do so, it is bound by its allegations, even as other litigants are bound by theirs. Furthermore, when the State does not specify at the outset which "sexual act" was committed by a defendant, it can be required to do so before trial on the indictment is had, *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978), and in answering a bill of particulars approved by the court, the State specified that the "sexual act[s] which defendant allegedly committed" were "physical touching and oral sex." Since "physical touching" is not a prohibited sexual act as defined by G.S. 14-27.1(4), under the State's answer to the bill of particulars, as well as under the indictment, the only crime that defendant was lawfully tried for was committing oral sex with the victim. While defendant is entitled to be acquitted of that charge, he has not been tried for committing the sex act on the child that the evidence recorded tends to show he committed, and if the State elects to do so it may proceed to indict and try the defendant therefor. *State v. Williams*, *supra*.

Reversed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. WADE SHIRLEN STRICKLAND

No. 8429SC1155

(Filed 15 October 1985)

1. Crime Against Nature § 1; Rape and Allied Offenses § 19— taking indecent liberties with children—not vague or overbroad

The statute which prohibits taking indecent liberties with children is not unconstitutionally vague and overbroad. G.S. 14-202.1.

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2. Rape and Allied Offenses § 19— taking indecent liberties with a minor—proximity to minor—evidence sufficient

Defendant's motion to dismiss a charge of taking indecent liberties with a minor was properly denied where two boys were playing in the backyard of their home, there was a creek ten or fifteen feet wide with woods and undergrowth on either side in back of their home, they observed defendant sitting on a log about 62 feet away on the other side of the creek masturbating, defendant invited the boys to jump across the creek and imitate his activity, and defendant ran away when the father of one of the boys berated defendant. Defendant was close enough for the boys to see what he was doing and to hear his invitation, and close enough for defendant to see them and invite them to imitate his activity. G.S. 14-202.1.

APPEAL by defendant from *Albright, Judge*. Judgment entered 29 June 1984 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 22 August 1985.

Defendant was convicted of taking indecent liberties with a minor. The State's evidence tends to show that: Two seven year old boys were playing in the backyard of a trailer home, behind which there was a creek ten or fifteen feet wide with woods and undergrowth on the other side. They observed defendant, 41 years old, sitting on a log about 62 feet away on the other side of the creek masturbating. Defendant invited the boys to "jump across the creek, sit down and play with yours and see what it feels like." The boys left the yard twice, once to go inside and once to go behind a building, but defendant did not leave and remained in view of the boys while they were in the yard. The father of one of the boys, observing defendant's activities from the trailer, went outside and berated the defendant until he ran away. Defendant presented no evidence.

Attorney General Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

White & Dalton, by Tony C. Dalton, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's first contention is that the prosecution should have been dismissed before trial, pursuant to his motion, because G.S. 14-202.1, which prohibits taking indecent liberties with children, is unconstitutionally vague and overbroad. This same contention was squarely rejected by our Supreme Court in *State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981).

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[2] Defendant next contends that the court erred in failing to dismiss the case at the close of the evidence because the evidence is insufficient to warrant his conviction. The indictment is based on Section (a)(1) of G.S. 14-202.1 (rather than Section (a)(2), which concerns a lewd or lascivious act committed or attempted on a child) and the State was required to prove that: (1) defendant is at least sixteen years old and more than five years older than the child in question, (2) the child is less than sixteen years old, and (3) defendant willfully took an indecent, immoral or improper liberty with the child for the purpose of gratifying his sexual desire. The first two elements, clearly established by evidence, require no discussion. As to the third element, defendant argues that: He was too far away from the children to be *with* them for the purpose of taking an indecent liberty, and that the word "with" in the statute requires close proximity or nearness, which the State's evidence failed to establish. This argument is rejected. In *State v. Turman*, 52 N.C. App. 376, 278 S.E. 2d 574 (1981), we refused to hold that physical touching is necessary in an indecent liberty prosecution under G.S. 14-202.1(a)(1), and in this case we refuse to hold that a defendant must be within a certain distance of or in close proximity to the child. Here, the defendant was about the same distance from the boys that home plate is from the pitcher's mound on a baseball diamond; it was close enough, according to the evidence, for the boys to see what he was doing and to hear his invitation; and it was close enough for defendant to see them and invite them to imitate his own activity. The liberty that defendant willfully took with the boys, according to evidence, in exposing his lewd and lascivious activity to them and inviting their participation was certainly indecent, immoral and improper; and that it was done for the purpose of arousing and gratifying his sexual desire could be inferred. Thus, this contention is overruled.

Defendant's other assignment of error, based on the court's refusal to instruct the jury that he had to be in close proximity to the boys in order to be guilty of the offense charged, is also overruled, for the reasons stated above.

No error.

Judges WELLS and WHICHARD concur.

Terry v. Bob Dunn Ford, Inc.

JERRY LEE TERRY v. BOB DUNN FORD, INC.

No. 8518SC197

(Filed 15 October 1985)

Trial § 4— failure of plaintiff to appear— plaintiff's counsel present— dismissal improper

The trial court erred by dismissing plaintiff's action for failure to appear and prosecute where plaintiff had not been ordered to appear for trial and plaintiff's attorney was present and appeared ready to go forward with his case. The appearance of his attorney of record was sufficient to meet the requirement that he prosecute his action.

APPEAL by plaintiff from *Beaty, Judge*. Judgment entered 5 November 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 September 1985.

This is a civil action wherein the plaintiff sued defendant to recover damages allegedly resulting from defendant's unlawful conversion of plaintiff's automobile. The matter came on for trial at the 22 October 1984 Session of Guilford County Superior Court. When the case was called for trial it was determined that the named plaintiff was not present in court. However, he was represented by his counsel of record. Also present was the plaintiff's wife who was prepared to testify regarding the allegations contained in the complaint. The defendant upon learning this fact made a motion to dismiss for "failure to come in and prosecute the case." Following counsels' arguments, the court entered an oral order allowing the motion. On 5 November 1984, a written order was entered dismissing plaintiff's action pursuant to Rule 41(b). Plaintiff appealed.

Robert S. Cahoon for plaintiff appellant.

Rivenbark & Kirkman, by Rodney D. Tigges and John W. Kirkman, Jr., for defendant appellee.

ARNOLD, Judge.

The trial court erred in dismissing plaintiff's action for failure to appear and prosecute his action. Plaintiff's attorney was present and appeared ready to go forward with his case.

As our Supreme Court recently stated:

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[O]ur research fails to disclose . . . any statute, rule of court or decision which mandates the presence of a party to a civil action or proceeding at the trial of, or a hearing in connection with, the action or proceeding unless the party is specifically ordered to appear. Those who are familiar with the operation of our courts in North Carolina know that quite frequently a party to a civil action or proceeding does not appear at the trial or a hearing related to the action or proceeding.

Hamlin v. Hamlin, 302 N.C. 478, 482, 276 S.E. 2d 381, 385 (1981). Plaintiff had not been ordered to appear for trial. The appearance of his attorney of record was sufficient to meet the requirement that he prosecute his action. The trial court's order is erroneous and is, hereby,

Reversed and remanded.

Judges WELLS and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 OCTOBER 1985

BIGGERS BROTHERS v. BROOKS, COMM. LAB. No. 8410SC1355	Wake (81CVS5642)	Affirmed
DILLINGHAM CONSTR. v. RUTHERFORD CO. No. 8529SC204	Rutherford (82CVS0393)	No Error
FLOYD v. FLOYD No. 8521SC458	Forsyth (84CVS2435)	Affirmed
HANOVER DISTRIBUTING v. CONNER No. 858SC599	Lenoir (83CVS1398)	Affirmed
IN RE BAKER No. 8512DC333	Cumberland (85SP204)	Vacated
IN RE LEE No. 851DC603	Cumberland (83J470)	No Error
LIVINGSTON v. GEORGIA ATCO No. 8510IC62	Ind. Comm. (H-5657)	Affirmed
STATE v. APOSTOLOPOULOS No. 8527SC633	Cleveland (84CRS485)	No Error
STATE v. ATKINSON No. 8511SC656	Johnston (84CRS8412)	Affirmed
STATE v. BARFIELD No. 8512SC598	Cumberland (84CRS51155)	No Error
STATE v. BLUE No. 8526SC74	Mecklenburg (84CRS20044)	New Trial
STATE v. BRYANT No. 8418SC1325	Guilford (84CRS24979)	No Error
STATE v. CLARK No. 8512SC592	Hoke (84CRS2432)	No Error
STATE v. COBB No. 857SC114	Edgecombe (84CRS5446) (84CRS6113)	No Error
STATE v. CROCKER No. 8515SC242	Alamance (83CRS16377) (83CRS16378) (83CRS1794)	Dismissed

STATE v. CURLEE No. 8519SC571	Rowan (84CRS9141) (84CRS9142) (84CRS9143)	No Error
STATE v. DANIELS No. 843SC1064	Pitt (83CRS14347)	No Error
STATE v. DENSON No. 8515SC570	Alamance (83CRS16484)	No Error
STATE v. ESTES No. 8511SC576	Lee (84CRS5422)	No Error
STATE v. FIFIELD No. 855SC651	New Hanover (84CRS23191)	No Error
STATE v. HICKLIN No. 8526SC586	Mecklenburg (83CRS59695)	No Error
STATE v. HOUSAND No. 856SC615	Halifax (84CRS9147)	No Error
STATE v. JONES No. 8515SC542	Alamance (84CRS3443)	No Error
STATE v. KING No. 8519SC601	Cabarrus (83CRS16201)	No Error
STATE v. McCORKLE No. 8526SC216	Mecklenburg (84CRS41862)	No Error
STATE v. McLAURIN No. 8516SC175	Scotland (84CRS820) (84CRS821)	No Error
STATE v. McNEIL No. 8523SC219	Wilkes (84CRS614) (84CRS615) (84CRS616) (84CRS617) (84CRS630)	No Error
STATE v. OLIVER No. 8418SC1185	Guilford (83CRS42217)	No Error
STATE v. OWENS No. 8419SC1148	Randolph (84CRS3406) (84CRS3407)	No Error
STATE v. VANHORN No. 8510SC543	Wake (83CRS84530) (83CRS84531)	Affirmed
STATE v. WILKERSON No. 8514SC589	Durham (83CRS16183)	No Error

STATE v. WILSON
No. 8528SC113

Buncombe
(83CRS29429)

No Error

SUMBLIN v. CRAVEN
COUNTY HOSPITAL
No. 854SC672

Onslow
(84CVS873)

No Error

TAYLOR v. CREATIVE FOODS
No. 8510IC652

Ind. Comm.
(IC981420)

Affirmed

In re Saunders

IN THE MATTER OF: DAWN MICHELLE SAUNDERS; JACKIE YVETTE SAUNDERS; AND JOHN GARY SAUNDERS; MINOR CHILDREN

No. 8525DC42

(Filed 15 October 1985)

Parent and Child § 1.5— termination of parental rights—absence of counsel—belated motion to set aside order

The trial court properly denied respondent's motion to set aside an order terminating his parental rights entered three years earlier while he was in prison on the ground that his statutory and constitutional rights to appointed counsel in the proceeding were not honored since (1) respondent had no right to appointed counsel under G.S. 7A-289.23 because that statute became effective after the proceeding to terminate respondent's parental rights had been concluded; (2) although respondent was duly served with summons and a copy of the petition, he failed to assert his constitutional right, if any, to appointed counsel and thus waived such right; and (3) respondent's motion was not timely filed under the provisions of G.S. 1A-1, Rule 60(b).

APPEAL by respondent from *Blair, Judge*. Order entered 26 September 1984 in District Court, CALDWELL County. Heard in the Court of Appeals 27 August 1985.

This proceeding to terminate the parental rights of John Barry Saunders, the respondent, in his three minor children was initiated by his estranged wife on 11 September 1980, at which time respondent was imprisoned in the state prison unit at Reidsville. Though respondent was duly served with the summons and a copy of the petition on 17 September 1980, he filed no answer or response and following a hearing on 29 April 1981, which he had no notice of, an order was duly entered terminating respondent's parental rights. Respondent, who is still in prison serving a ten-year sentence, did not contact or communicate with the court about the proceeding in any manner until shortly after 10 June 1984 when he learned that his rights had been terminated. He then wrote the Clerk of Court for a copy of the order and on 13 July 1984 filed a *pro se* "Motion to Reinstate Parental Rights." In substance, the motion alleged that: When the summons was served on him he was imprisoned and had no access to legal counsel; as an indigent he had a right to court-appointed counsel but was not notified of that fact; if he had known that he had a right to counsel he would have exercised that right; he did not learn that the order terminating his parental rights had been

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entered until 10 June 1984 and would have appealed from that order when it was entered if he had known of it; the grounds asserted in the petition for terminating his parental rights had no merit, and he had a good defense to them. Petitioner moved to dismiss respondent's motion and following a hearing thereon the motion was allowed.

In dismissing respondent's motion the court found facts as stated above and also that: Respondent was properly notified of the nature of the case filed against him and "failed without reasonable or lawful excuse to file answer in apt time or otherwise appear to contest said action."

No brief filed for petitioner appellee.

Robbins, Flaherty & Lackey, by David S. Lackey, for respondent appellant.

PHILLIPS, Judge.

The only question presented by this appeal is whether respondent's motion to set aside the order entered three years earlier was properly dismissed by the trial court without a hearing on the merits. We hold that the motion was properly dismissed, because in light of the circumstances recorded it stated no lawful grounds for setting the order aside. The only grounds asserted for setting the order aside is that his legal and constitutional right to appointed counsel in the proceeding was not honored. Assuming that he once had such a right, it is plain that he has it no longer, because none of the record facts or the court's findings and conclusions based thereon are questioned and they establish that respondent waived any right to relief he may have ever had. Respondent never had a statutory right to court-appointed counsel though, for the amendment to G.S. 7A-289.23 which authorizes court-appointed counsel for indigent respondents in parental rights termination cases did not become effective until 9 August 1981, after the proceeding had been both initiated and concluded. And as to his entitlement to appointed counsel, as a matter of law, under the due process and law of the land clauses of the United States and North Carolina Constitutions, which respondent argues was the case, our Supreme Court ruled otherwise in the case of *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981). The rule laid down was that in proceedings like this initiated before 9

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August 1981, an indigent parent's right to appointment of counsel is not automatic as a matter of law, but depends upon the circumstances of each case; and in this case respondent, without excuse, called no circumstances requiring determination to the court's attention until long after his rights had been adjudicated.

Thus, even if respondent had a right to the appointment of counsel when the proceeding was brought against him, he waived it by failing to assert it within apt time. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970). With express knowledge that steps to terminate his parental rights were underway, he did nothing whatever to contest the proceeding or even to inform himself about its progress until more than three years after it had been finally adjudicated. Even constitutional rights are not self-executing; some initiative and action is often necessary to retain them. Respondent's claim that he would have exercised his right to appointed counsel if he had known that he had it does not override the fact that he neither attempted to ascertain what his rights were nor sought the court's aid in regard to them for an inordinate length of time. Receiving neither information nor inquiry from respondent, the court had no way of knowing that respondent either opposed the proceeding or desired the assistance of appointed counsel in regard to it; and that the court proceeded apace to finally adjudicate respondent's rights should not have surprised him. Since respondent could have readily learned about the adjudication if he had tried to do so, his assertion that he would have appealed from it if he had known about it is likewise without legal significance. Furthermore, respondent's motion was not timely filed. The motion is one for relief from a judgment or order under the terms of Rule 60(b), N.C. Rules of Civil Procedure, which provides that motions for relief on some of the grounds authorized must be filed within a year after the judgment is entered, and motions for relief on the other grounds authorized must be filed "within a reasonable time" after the judgment is entered. Which time limit applies to respondent's motion need not be determined, since it manifestly was not filed within either one.

Affirmed.

Judges WELLS and WHICHARD concur.

State v. Baker

STATE OF NORTH CAROLINA v. EDDIE DEAN BAKER

No. 8523SC231

(Filed 15 October 1985)

Constitutional Law § 49— waiver of counsel—failure to check one statement on form

The trial judge's failure to make a check mark on a waiver of counsel form opposite the statement that defendant "executed the above waiver in my presence after its meaning and effect have been fully explained to him" did not invalidate defendant's waiver of counsel where the record clearly states that defendant was duly advised of his right to counsel and voluntarily chose not to exercise it, both the judge and the defendant signed the waiver form, and nothing in the record supports the idea that the explanations required by law were not duly made by the judge and understood by defendant.

APPEAL by defendant from *Rousseau, Judge*. Order entered 8 October 1984 in Superior Court, ASHE County. Heard in the Court of Appeals 26 September 1985.

Attorney General Thornburg, by Senior Deputy Attorney General William W. Melvin, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant appellant.

PHILLIPS, Judge.

Defendant appeals from an order invoking suspended sentences of 6 months and 1 month in jail. The jail sentences, imposed by the Ashe County District Court on 13 September 1984 following defendant's conviction of drunk and disruptive conduct, G.S. 14-444, and communicating threats, G.S. 14-277.1, were suspended for five years on condition that he neither possess nor consume any alcoholic beverage during that time. The same day the sentences were imposed defendant walked into the office of the Ashe County Sheriff in an intoxicated condition carrying three cans of beer in a paper bag. The Sheriff reported the incident to the court and the next day, after a hearing, the District Court revoked the suspension and put the jail terms in effect. Defendant appealed the revocation to the Superior Court and following a *de novo* hearing Judge Rousseau also activated the suspended jail terms.

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The question presented for our determination is not whether defendant violated the conditions of the suspended sentences, but is whether the sentences were lawfully imposed in the first place. Defendant contends that the sentences were not lawfully imposed because he was denied the assistance of court-appointed counsel when he was tried, convicted and sentenced in the District Court. As he correctly points out *State v. Neeley*, 307 N.C. 247, 297 S.E. 2d 389 (1982) is authority for the proposition that the activation of a suspended sentence can be challenged on the grounds that the defendant's right to counsel was denied when sentence was imposed. But in this case defendant's right to counsel was not denied in the District Court and we affirm the invocation of the jail terms. The record shows that defendant lawfully waived his right to the assistance of court-appointed counsel; it shows that he signed the standard waiver form, under oath, thereby declaring that he did so voluntarily with knowledge of the charges and the possible punishment for them; and it also shows that the judge signed the certificate thereon, thereby certifying that the procedures required were followed. The only deficiency in the entire process, according to the record, is that the judge did not make a check mark on the form opposite the statement that defendant "executed the above waiver in my presence after its meaning and effect have been fully explained to him." This deficiency, obviously a mere clerical oversight, does not invalidate the waiver. Nothing in the record supports the idea that the explanations required by law were not duly made by the judge and understood by the defendant. That both the judge and the defendant signed the form, the latter under oath, strongly indicates that the requisites were duly complied with. Defendant's reliance upon *State v. Neeley*, *supra* is misplaced. In that case the record as to the defendant's purported waiver of his right to counsel was completely silent; while in this case the record clearly states that defendant was duly advised of his right to counsel and knowingly and voluntarily chose not to exercise it.

The only other assignment of error brought forward is for the court excluding testimony by the defendant concerning his representation by counsel when the suspended sentences were imposed. This assignment is also overruled. All that the record shows in this regard is that: When counsel asked defendant whether he had an attorney "when you were tried originally

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before Judge Ferree," the State's objection to the question was sustained by the court. No other questions on that subject were asked by defense counsel and no offer of proof was made pursuant to the provisions of Rule 43(c), N.C. Rules of Civil Procedure. Since the record does not show what defendant's testimony would have been, we have no basis for concluding that excluding it was either error or prejudicial. *Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978).

Affirmed.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. JOE RAY GRINDSTAFF

No. 8524SC194

(Filed 15 October 1985)

Searches and Seizures §§ 3, 16— seizure of plants from outbuilding—open fields doctrine—plain view doctrine—consent by defendant's wife

Officers lawfully seized marijuana and opium poppy plants from a building twenty-three feet from defendant's house where defendant's probation officer had received information that defendant was growing marijuana; the probation officer and several deputies lawfully searched the fields behind defendant's house under the "open fields" doctrine; while the officers were returning to the house, a deputy looked through the open door of the building and saw what appeared to be marijuana plants, and the plants thus could have been seized under the "plain view" doctrine; and officers proceeded to the house and lawfully obtained the consent of defendant's wife to search the premises before they returned to the building and seized the marijuana and poppy plants.

APPEAL by defendant from *Lamm, Judge*. Judgment entered 4 October 1984 in Superior Court, MITCHELL County. Heard in the Court of Appeals 25 September 1985.

Defendant was properly indicted on a charge of manufacture of a controlled substance. The State's evidence tends to show the following facts: On 25 July 1983 defendant's probation officer and several deputy sheriffs visited defendant's home while he was at work. They knocked on the door, received no answer, and fol-

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lowed a path to the fields behind defendant's house, searching for marijuana. Twenty to thirty minutes later they headed back to the house, passing a small building located twenty-three feet from the house. As they passed the open door of the building, one of the deputies glanced in and saw what appeared to be marijuana on top of a pile of hay.

The men returned to the house and defendant's wife answered their knock. They requested and received permission to search the premises. When they returned to the small building they found a marijuana plant and three opium poppies.

Prior to trial defendant moved to suppress the poppy plants as the fruit of an illegal search. The motion was denied, and after a jury trial, defendant was found guilty of possession of a controlled substance. From judgment entered on the verdict, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant, appellant.

HEDRICK, Chief Judge.

We note at the outset that defendant's notice of appeal was not timely given. The State has not addressed this issue, however, and we have elected to treat this appeal as a petition for a writ of certiorari and allow the same in order to pass on the merits of defendant's appeal.

Defendant first assigns error to the trial court's denial of his motion to suppress on the following grounds: 1) the warrantless search was not based on any exigent circumstances; 2) defendant, as a condition of an earlier probation, had consented to warrantless searches of his person or premises but only in his presence, and he was not present on this occasion; 3) defendant's wife was not authorized to consent to the search; 4) pursuant to the condition of probation, only defendant's probation officer, and not law enforcement officers, were authorized to make warrantless searches; and 5) the outbuilding was within the "curtilage" of defendant's home and thus he had an expectation of privacy in it.

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For the reasons stated below, we find all of these arguments unpersuasive.

Defendant's probation officer had received information that defendant was growing marijuana. Accompanied by several deputy sheriffs, he proceeded to search the fields behind defendant's house. Such a search is constitutional under the "open fields" doctrine, which allows police officers to enter and search a field without a warrant. *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924); *State v. Simmons*, 66 N.C. App. 402, 311 S.E. 2d 357 (1984). As the officers were returning along a footpath to the house, they passed the open outbuilding, and one of the deputy sheriffs, glancing in, saw what looked like several marijuana plants lying on a bale of hay. This discovery was proper pursuant to the "plain view" doctrine, and had the deputy sheriff so desired, he could have lawfully seized the plants at that moment, since all three requirements for a "plain view" seizure were met. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, *rehearing denied*, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed. 2d 120 (1971); *State v. Prevette*, 43 N.C. App. 450, 259 S.E. 2d 595 (1979), *disc. rev. denied*, 299 N.C. 124, 261 S.E. 2d 925 (1980), *cert. denied*, 447 U.S. 906 (1980).

The officers, however, did not seize the plants at that time. Instead, they proceeded to the house and obtained the consent of defendant's wife to search. Her consent was lawfully given since she was in possession of the premises and "her common authority was apparent to the officer who approached the front door and indicated his purpose for being there." *State v. Carter*, 56 N.C. App. 435, 437, 289 S.E. 2d 46, 47, *disc. rev. denied*, 305 N.C. 761, 292 S.E. 2d 576 (1982).

Thus, all defendant's exceptions to the search and seizure of the poppy plants are without merit. The officers, pursuant to information they had received, had a lawful right to be on the premises; their discovery of the plants met all "plain view" requirements; and the consent of defendant's wife was lawful, thus rendering moot any arguments based on curtilage or lack of a warrant.

Defendant's second assignment of error is to the trial court's admission of testimony concerning the contemporaneous seizure of marijuana from the outbuilding. He contends that this evidence

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was prejudicial because it tended to show "his bad character or propensity to involve himself with controlled substances." We find no merit in this argument. One of the officers testified that it was the marijuana plants that attracted his attention and not the poppy plants, which at the time he could not identify. That being the case, the testimony regarding the marijuana plants was necessary to explain the actions of the law enforcement officers with respect to the poppy. Additionally, defendant has not shown a reasonable likelihood that a different result would have been obtained had this testimony been excluded.

Defendant had a fair trial free from prejudicial error.

No error.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. RICHARD LEE GEORGE

No. 8523SC147

(Filed 15 October 1985)

1. Automobiles and Other Vehicles § 127.1— driving while impaired—sufficient evidence

The evidence was sufficient to support defendant's conviction of driving while impaired because on the date in question he "had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.10 or more" where it tended to show that a car driven by defendant was involved in an accident at 6:40 p.m.; defendant admitted that he drank 32 ounces of beer between 1:00 p.m. and 4:00 p.m. on the day in question; defendant drank three beers within a space of 30 minutes after 6:45 p.m.; and at 10:57 a breathalyzer test showed that defendant still had a blood alcohol level of 0.13.

2. Automobiles and Other Vehicles § 126.3— time of breathalyzer test

The fact that three hours had passed from the time defendant operated a vehicle until a breathalyzer test was given goes to the weight rather than the admissibility of the breathalyzer evidence.

3. Automobiles and Other Vehicles § 130.1— sentence for driving while impaired—enhancement by D.U.I. conviction under prior law

Defendant was not unconstitutionally imprisoned because his sentence for driving while impaired was enhanced by the use of a D.U.I. conviction which occurred prior to the effective date of the Safe Roads Act.

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APPEAL by defendant from *Brannon, Judge*. Judgment entered 6 September 1984 in Superior Court, YADKIN County. Heard in the Court of Appeals 24 September 1985.

Defendant was charged with driving while impaired and failure to stop at the scene of an accident. Defendant was found guilty in district court and appealed to superior court. In superior court the charge of leaving the scene of an accident was dismissed at the close of the State's evidence. The jury found defendant guilty of driving while impaired because on the date in question he "had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.10 or more." From a judgment sentencing him to one year imprisonment and fining him \$1,000 defendant appealed. Release pending appeal was denied.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery III, for the State.

Zachary, Zachary and Harding, by Lee Zachary, for defendant appellant.

ARNOLD, Judge.

[1] The defendant contends the court erred by failing to grant his motion to dismiss at the close of all the evidence. We disagree.

The evidence offered at trial tended to show that on 28 January 1984, at approximately 6:40 p.m., an accident occurred on Highway 21 in Yadkin County when a 1975 or 1976 Cutlass struck a vehicle operated by Steven Brown. Brown could not see who was driving the car but he was able to get the license number of the vehicle. Brown had also seen the defendant drive the car at some time prior to the accident. Mr. Brown called the State Highway Patrol and Trooper Vance was dispatched to investigate the accident. The trooper determined that Ms. Sadie Wall, the defendant's mother, was the owner of the vehicle. When the trooper went to Ms. Wall's residence neither the defendant nor the vehicle were at the residence. At approximately 8:45 p.m., the trooper found the defendant and the vehicle at Ron Stanley's house. The defendant appeared to be impaired at that time. During questioning defendant admitted that he had consumed four eight-ounce

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draft beers between 1:00 p.m. and 3:50 p.m. on the day in question, but he denied being involved in an accident. At 10:57 p.m. defendant submitted to a breathalyzer test which showed that he had a 0.13 alcohol concentration in his blood.

Defendant testifying in his own defense denied that he was involved in the accident. He testified he had consumed some beer between 1:00 p.m. and 4:00 p.m. and then went and talked to a girl at the Hardee's in Yadkinville. He stated that he left the Hardee's about 6:45 and drove up Highway 601 to his brother-in-law's house. After he arrived there, he drank three beers within the space of thirty minutes. He was in bed at the house when the trooper arrived to inquire about the accident.

In determining whether the court erred in denying the defendant's motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference which can be drawn therefrom. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). The defendant's evidence, when not in conflict with the State's evidence, may be used to explain or clarify the evidence offered by the State. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

Defendant, by his own admission, drank thirty-two ounces of beer within a three hour period and then proceeded to drive upon the public highways of our State. Defendant also testified that he had consumed only three beers after he reached his destination. Yet, the evidence showed that three hours and forty-five minutes after driving he still had a blood alcohol level of 0.13. This evidence, taken in the light most favorable to the State and giving the State the benefit of all inferences which could be drawn therefrom, was sufficient to survive defendant's motion to dismiss.

Defendant also contends the court erred by allowing the introduction of the breathalyzer reading because it was not made at a relevant time and because it was introduced without laying a proper foundation.

[2] The prerequisites necessary for the introduction of a breathalyzer reading are to show: (1) that the person administering the test possessed a valid permit issued by the Department of Human Resources; and (2) that the analysis was performed by the

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methods approved by the Commission for Health Services. G.S. 20-139.1(b). Our examination of the record convinces us that these prerequisites were met. With regard to the defendant's argument that the breathalyzer test was not given at a relevant time after driving, the fact that three hours had passed from the time the defendant operated the vehicle until the breathalyzer test was given goes to the weight to be given the evidence rather than its admissibility. The breathalyzer evidence was properly admitted.

[3] Finally, defendant argues that he was unconstitutionally imprisoned because his sentence was enhanced by the use of a D.U.I. conviction which occurred prior to the effective date of the Safe Roads Act. We note that defendant attempts to raise this issue for the first time in his brief. The issue was not raised in the trial court, nor is it based upon any exception or assignment of error in the record on appeal. Rule 10(a) of the Rules of Appellate Procedure in pertinent part provides that "the scope of review on appeal is confined to a consideration of those exceptions set out in the record on appeal or in the verbatim transcript of proceedings . . . and made a basis of assignments of error in the record on appeal. . . ." Thus, defendant has waived his right to raise this issue on appeal. Nevertheless, in our discretion, we have considered the argument and find it to be without merit.

No error.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. JERRY DOUGLAS DULA

No. 8523SC29

(Filed 15 October 1985)

Automobiles and Other Vehicles § 127.2— identity of defendant as driver—sufficiency of circumstantial evidence

In a prosecution for driving while impaired and driving while license was revoked, the State's evidence was sufficient to support a jury finding that defendant was the driver of a car when it left the road where it tended to show that a witness saw black tire marks on the highway, dust in the air, and a car with its headlights on lying on its top in a field near the highway; the

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witness found only defendant in the car and saw that the car doors were closed and the windows were rolled up; and the investigating patrolman was unable to open the car doors. Evidence that defendant told the investigating patrolman that he was not the driver and testimony by a witness for defendant that he was the driver and was thrown out while the car was turning over merely presented a question for the jury as to whether defendant was the driver.

APPEAL by defendant from *Rousseau, Judge*. Judgments entered 25 September 1984 in Superior Court, WILKES County. Heard in the Court of Appeals 17 September 1985.

Attorney General Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Dennis R. Joyce for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of driving an automobile while impaired and while his license was permanently revoked. That defendant was impaired and his license was revoked is not disputed. The only question presented for our determination is whether the evidence introduced at trial was sufficient to establish that defendant was operating the automobile on the occasion charged. In gist, the evidence was that: A motorist traveling on N.C. Highway 18 the night involved saw some black tire marks on the highway, dust in the air, and a car, with its headlights on, lying on its top in a field near the highway. Going to the car, this witness found only the defendant in it, he saw that the car doors were closed and the windows were rolled up; and looking around the area nearby, he saw no one else. The investigating patrolman called to the scene observed tire marks which led from the black marks on the highway across the highway shoulder and field to where the overturned car was; and upon examining the car doors he was unable to open them.

This evidence is clearly sufficient, in our opinion, to justify the inference that defendant was driving the car before it left the public highway; and its sufficiency is not affected by the fact that other evidence tended to show that defendant was not driving. The other evidence consisted of an admission extracted from the investigating patrolman that defendant told him he was not the driver, and testimony by a witness for the defendant to the effect

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that: He drove the car, was thrown out through a door which opened while the car was turning over, and left the scene quickly because he was afraid. The State was not required to disprove this version of the matter; nor did it have to prove to a scientific certainty that defendant was the driver of the car; it only had to present evidence from which that fact could be deduced by reasonably minded people. And it matters not that the State's evidence was entirely circumstantial, while the defendant's evidence was direct and by a professed participant and eyewitness. The weight of all evidence is for the jury, which often finds physical circumstances more reliable than the testimony of eyewitnesses, as our courts have noted many times.

No error.

Judges WELLS and WHICHARD concur.

GREGG HORNBY, D/B/A THE TOUCH OF CLASS v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY AND C. BENJAMIN SPRADLEY, D/B/A C. BENJAMIN SPRADLEY INSURANCE

No. 855SC137

(Filed 15 October 1985)

1. Appeal and Error § 68.2— prior trial—same evidence—prior appeal law of the case

Where plaintiff presented substantially the same evidence at the second trial of an action arising from a failure to procure insurance coverage, the Court of Appeals' prior determination that the evidence in this case was sufficient to submit to the jury on the question of the insurance company's liability under generally accepted principles of agency was the law of the case. Rules of App. Procedure, Rule 28(a).

2. Rules of Civil Procedure § 50.5— denial of motion for directed verdict—preserved for appeal

Defendant adequately preserved for appeal the trial court's denial of its motion for a directed verdict on the issue of punitive damages in an action arising from a failure to procure insurance where defendant timely moved for a directed verdict and stated the specific grounds therefor, excepted to and assigned as error the denial of its motion, made a timely motion for judgment n.o.v. after the verdict, immediately gave notice of appeal when the motion was denied, brought forward the assignment of error, and presented the

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arguments and authorities on which it relies in its brief. G.S. 1A-1, Rule 50, Rules of App. Procedure, Rules 10 and 28(a).

3. Insurance § 2.2— failure to procure insurance—punitive damages—not supported by evidence

An award of punitive damages against defendant insurance company for failure to procure insurance was not supported by evidence which showed only that defendant's agent was negligent in his efforts to procure insurance for plaintiff and that defendant negligently delayed acting on plaintiff's application for insurance, but did not show that defendant or its agent intentionally or wantonly delayed acting upon the application and effecting coverage and did not show any other element of aggravation accompanying defendant's or its agent's negligence. G.S. 58-177(4) (1982).

4. Insurance § 2.2— failure to procure insurance—problems with other policies—admissible

There was no error in an action for damages arising from a failure to procure insurance in the admission of evidence that tended to show that defendant's agent had experienced problems or delays with other accounts with defendant. The problems with other accounts were sufficiently similar and close in time to be relevant to the question of defendant's negligence.

5. Insurance § 2.2— failure to procure insurance—statutory definition of agent read to jury—no error

There was no error in an action for damages arising from a failure to procure insurance where the court permitted plaintiff's attorney to read into evidence the first sentence of G.S. 58-46 (1982), which provides that any agent who acts for a person other than himself in negotiating an insurance contract is the company's agent for the purpose of receiving the premium. This sentence was relevant because an agent acting on behalf of defendant negotiated with plaintiff for a contract of insurance and accepted a premium from plaintiff.

6. Insurance § 2.4— failure to procure insurance—crossclaim by company against agent—directed verdict for agent proper

In an action against an insurance company and agent arising from a failure to procure insurance, there was no prejudicial error in granting the agent's motion for a directed verdict on the company's crossclaim for indemnity because the company was found by the jury to be actively negligent and was therefore *in pari delicto* with the agent and not entitled to indemnity from him.

APPEAL by defendant Pennsylvania National Mutual Casualty Insurance Company from *Lewis (John B., Jr.)*, Judge. Judgment entered 15 February 1984 in NEW HANOVER County Superior Court. Heard in the Court of Appeals 14 August 1985.

This is a civil action in which plaintiff seeks to recover compensatory, consequential and punitive damages from defendants

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for breach of contract, negligence and fraud. Plaintiff alleged, in pertinent part, that in March 1977 defendant Pennsylvania National Mutual Casualty Insurance Company (Penn), through its agent defendant Spradley, entered into a contract of fire and casualty insurance with plaintiff covering a building and its contents, all owned by plaintiff; that the insured property was substantially damaged by fire in December 1977; that plaintiff immediately reported the loss to Spradley; and that Penn denied coverage for the loss, thereby damaging plaintiff by its refusal to honor its insurance contract.

Plaintiff alleged alternative claims for relief based on Spradley's negligent failure, and breach of his contract, to procure insurance coverage; Spradley's fraudulent misrepresentation that plaintiff had insurance coverage; and Penn's negligent failure to effect insurance coverage. Penn and Spradley filed answers generally denying plaintiff's allegations and Penn filed a cross-claim against Spradley for indemnity.

When the action first went to trial, the trial court granted a directed verdict in favor of Penn at the close of plaintiff's evidence and denied Spradley's motion for a directed verdict. Plaintiff took a voluntary dismissal without prejudice as to Spradley and appealed from the judgment entered in favor of Penn. This Court affirmed in part and reversed in part the judgment entered and remanded the action to the trial court. See *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 303 S.E. 2d 332, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 364 (1983). This Court held that the trial court had properly granted a directed verdict for Penn on plaintiff's breach of contract claim because the evidence showed that plaintiff was not covered by a valid binder at the time of the fire and was never issued a written insurance policy, but further held that the court had improperly granted a directed verdict for Penn on plaintiff's negligence claims. *Id.* This Court found that the evidence, when viewed in the light most favorable to plaintiff, was sufficient to submit to the jury the issues of whether Penn was negligent by its own actions in failing to effect insurance coverage and whether Penn was liable for negligence on the part of its agent Spradley. *Id.*

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Before this action came on for retrial, plaintiff filed a new suit against Spradley which was consolidated with the present action for trial. At the close of the evidence at the second trial, plaintiff again dismissed his action against Spradley and the trial court granted a directed verdict for Spradley on Penn's cross-claim for indemnity. Penn moved for directed verdicts on several issues, including the issues of agency and punitive damages, but its motions were denied.

The jury answered the issues submitted as follows:

1. Did the Defendant, Pennsylvania National Mutual Casualty Insurance Company negligently fail to effect insurance coverage on the Plaintiff's Hornby's property?

ANSWER: YES

2. Did Spradley negligently fail to take the steps necessary to effect insurance coverage on the Plaintiff's property?

ANSWER: YES

3. If so, was Spradley acting as agent of Defendant Pennsylvania National Mutual Casualty Insurance Company?

ANSWER: YES

4. What amount, if any, is the Plaintiff entitled to recover of the Defendant Pennsylvania National Mutual Casualty Company?

ANSWER: \$75,000.00

5. What amount of punitive damages, if any, should be awarded to Hornby against Pennsylvania National Mutual Casualty Company?

ANSWER: \$68,750.00

From the judgment entered in accordance with the verdict, Penn appealed.

The facts of this case, as shown by the evidence presented by plaintiff at the first trial of this matter, are set forth in *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, *supra*. Since it appears that plaintiff presented substantially the same evidence at the second trial, we feel it is unnecessary to repeat those facts herein.

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Rose, Rand, Ray, Winfrey & Gregory, P.A., by Ronald E. Winfrey, and Newton, Harris & Shanklin, by Kenneth A. Shanklin, for plaintiff.

Johnson & Lambeth, by Robert White Johnson, for defendant Pennsylvania National Mutual Casualty Insurance Company.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant C. Benjamin Spradley.

WELLS, Judge.

[1] Penn contends the trial court erred in submitting the issue of agency to the jury and in its charge to the jury on this issue. Penn argues that the evidence shows that Spradley was an independent contractor, rather than its employee, and that therefore it was not liable for any negligence on the part of Spradley.

This same argument was made by Penn and rejected by this Court on the first appeal in this action, see *Hornby v. Penn. Mut., supra*, as conceded by Penn in a document filed with this Court. The law is clear that "[o]nce an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983); *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E. 2d 181 (1974). This is so provided the same facts and the same questions which were determined in the previous appeal are involved in the subsequent appeal. *Transportation, Inc. v. Strick Corp., supra*. This Court's prior determination that the evidence in this case was sufficient to submit to the jury the question of Penn's liability based on the negligence of Spradley under generally accepted principles of agency is the law of this case; therefore, we are bound by it and must reject Penn's argument.

Although Penn noted exceptions to certain portions of the jury charge relating to the issue of agency and made these exceptions the basis of an assignment of error, no argument or discussion appears in its brief relating to the instructions to the jury on this issue other than its argument that the issue should not have been submitted at all. Any other contentions Penn may have had with respect to the instructions on this issue are therefore

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deemed abandoned. *See* Rule 28(a) of the Rules of Appellate Procedure; *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977); *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

[2] Penn assigns as error the trial court's denial of Penn's motion for a directed verdict on the issue of punitive damages. Plaintiff asserts that Penn has not properly preserved this assignment of error for review. We disagree. Penn timely moved for a directed verdict on the issue of punitive damages and stated the specific grounds therefor, and excepted to, and assigned as error, the denial of its motion. After the verdict was returned, Penn made a timely motion for judgment notwithstanding the verdict and immediately gave notice of appeal when the motion was denied. Penn brought forward this assignment of error and presented the arguments and authorities on which it relies in its brief. Such actions were clearly adequate to preserve this issue for review. *See* Rules 10 and 28(a) of the Rules of Appellate Procedure; N.C. Gen. Stat. § 1A-1, Rule 50 of the Rules of Civil Procedure (1983).

[3] Penn argues that the issue of punitive damages should not have been submitted to the jury because no evidence was presented of conduct on its part which would justify an award of such damages. It further argues that an award of punitive damages against it based on the conduct of Spradley could not be upheld because the evidence shows that it is not liable for Spradley's conduct since Spradley was an independent contractor, not an employee. The latter argument must fail since it has been determined that sufficient evidence was presented to submit to the jury the question of Penn's liability based on Spradley's conduct under agency principles. In addition, it is clear that in this state liability for punitive damages may be imposed on a principal based on the conduct of its agent. *See Hairston v. Greyhound Corp.*, 220 N.C. 642, 18 S.E. 2d 166 (1942).

As a general rule, punitive damages are recoverable only when the tortious conduct which causes the injury partakes of or is accompanied by some element of aggravation such as "fraud, malice, gross negligence, insult," or "when the wrong is done willfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570

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(1922). See also *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981); *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). As summarized by one noted commentator, punitive damages may be awarded only when the defendant commits the actionable legal wrong willfully (i.e., knowingly, intentionally and voluntarily), wantonly (i.e., in conscious and intentional disregard of and indifference to the rights and safety of the plaintiff), or maliciously (i.e., motivated by personal hatred, ill will or spite for the plaintiff). S. Ervin, Jr., *Punitive Damages In North Carolina*, 59 N.C. L. Rev. 1255 (1981). Punitive damages are awarded in addition to compensatory damages for the purpose of punishing the wrongdoer and deterring others from committing similar acts. *Shugar v. Guill*, *supra*; *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

Punitive damages are recoverable not only for intentionally inflicted injuries but for negligently inflicted injuries as well when the tortfeasor's conduct is wanton or gross. *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 319 S.E. 2d 217 (1984). In *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956), our Supreme Court explained that when the term "gross negligence" was referred to in the past as a basis for the recovery of punitive damages the term was used in the sense of wanton conduct. The Court further stated:

Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.

Id.

We note that this Court has recognized previously that punitive damages may be assessed against an insurer in appropriate circumstances. See, e.g., *Dailey v. Integon General Ins. Corp.*, --- N.C. App. ---, 331 S.E. 2d 148 (1985); *Payne v. N.C. Farm Bureau Mutual Ins. Co.*, 67 N.C. App. 692, 313 S.E. 2d 912 (1984).

Plaintiff argues that an award of punitive damages is justified in this case based on Penn's alleged violation of N.C. Gen. Stat. § 58-177(4) (1982). G.S. 58-177 provides:

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No fire insurance company shall issue fire insurance policies . . . on property in this State other than those of the substance of the standard form as set forth in G.S. 58-176 except as follows:

. . .

(4) Binders or other contracts for temporary insurance may be made . . . for a period which shall not exceed 60 days

. . . .

Plaintiff argues that the evidence shows that Penn routinely violated G.S. 58-177(4) by taking more than 60 days to pass upon applications for insurance and that Penn used its violation of the statute to escape contractual liability. Plaintiff further contends that Penn violated the statute either intentionally or wantonly, and that Penn's treatment of him was under circumstances of willfulness, insult, indignity, capriciousness, and oppression.

We find plaintiff's arguments unpersuasive. The evidence shows only that Penn negligently delayed in acting upon plaintiff's application for insurance. It does not show that Penn intentionally or wantonly delayed in acting upon the application, nor does it show that there was any other element of aggravation in or accompanying Penn's negligence. Thus, assuming *arguendo* that Penn's negligent failure to act timely upon plaintiff's application constituted a violation of G.S. 58-177(4), we find nothing in Penn's violation which justifies an award of punitive damages.

We further find no basis for an award of punitive damages in the conduct of Spradley. The evidence shows only that Spradley was negligent in his efforts to procure insurance for plaintiff. It does not show that Spradley intentionally, maliciously, or wantonly failed to effect insurance coverage for plaintiff, nor does it show any element of aggravation accompanying Spradley's negligence. We conclude that the conduct of both Penn and Spradley falls far short of that required to justify an award of punitive damages. Accordingly, we hold that the award of punitive damages for plaintiff and against Penn is not supported by the evidence and must be vacated.

[4] Penn next contends the court erred in admitting evidence relating to problems which Spradley allegedly had with Penn on unrelated insurance accounts. The evidence in question tends to

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show that Spradley experienced problems or delays with other accounts he handled for Penn which were similar to the problems he had with Penn concerning plaintiff's application. Penn argues that the evidence was irrelevant to the issues in the case and that its admission constituted prejudicial error.

Evidence of similar occurrences may be admitted as relevant to the issue of negligence when substantial identity of circumstances and reasonable proximity in time are shown. 1 Brandis, *N.C. Evidence* § 89 (2d rev. ed. 1982). Where the circumstances of the occurrences are so dissimilar, however, that the evidence is without substantial value, the evidence should be excluded because the benefit of receiving it is outweighed by the harm resulting from possible confusion of the issues. *Id.*

The problems Spradley had with Penn on other accounts were shown to be sufficiently similar and close in time to the problems he had with Penn concerning plaintiff's application so as to justify admission of the evidence in question. The evidence was relevant on the issue of whether Penn was negligent by its actions and it does not appear that its probative value was outweighed by the danger of confusion of the issues. We therefore find no error in its admission.

[5] Penn contends the court erred in allowing plaintiff's attorney to read into evidence the first sentence of N.C. Gen. Stat. § 58-46 (1982). Penn argues that the statute was irrelevant, that it was taken out of context, and that its admission was prejudicial error. The first sentence of G.S. 58-46 provides that "[a]ny agent or broker who acts for a person other than himself negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent" The evidence here tends to show that Spradley, acting on behalf of Penn and pursuant to the authority granted him by his written agreement with Penn, negotiated with plaintiff concerning a contract of insurance and accepted a premium from plaintiff for the desired contract. Thus, the first sentence of G.S. 58-46 appears to be relevant in this case on the issue of agency. We therefore find no error in its admission. Even assuming *arguendo* that the statute was irrelevant, we do not agree that its admission into evidence constituted prejudicial error.

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The remaining portion of the statute which was not read into evidence sets forth a penalty to be imposed against an agent or broker who knowingly procures by fraudulent representations payment of an insurance premium. It was not necessary for this portion of the statute to be read for the jury to understand the first sentence of the statute and its relevance to the issues in this case. We therefore do not agree that the portion of the statute read to the jury was unfairly or improperly taken out of context.

[6] Penn next contends the court erred in granting Spradley's motion for a directed verdict on its crossclaim for indemnity. Penn argues that the jury could have found that Penn was not actively negligent but was vicariously liable for the negligence of its agent, Spradley, and that based on such findings it would have been entitled to indemnity from Spradley.

The general principles of indemnity have been set forth by our Supreme Court as follows:

A cross-claim for indemnification may be asserted by one original defendant against another when it is based on allegations of primary liability arising by law in respect of plaintiff's claim as opposed to merely secondary liability thereon of the cross-claiming defendant, as in cases of active and merely passive negligence, or of direct and merely vicarious liability. . . . Where two persons are jointly liable in respect to a tort, one being liable because he is the active wrongdoer, the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tortfeasor, will ordinarily be allowed to recover full indemnity over against the actual wrongdoer. [Citations omitted.]

Hildreth v. Casualty Co., 265 N.C. 565, 144 S.E. 2d 641 (1965). See also *Hendricks v. Fay, Inc.*, 273 N.C. 59, 159 S.E. 2d 362 (1968). There is, however, an established rule of exclusion which prevents application of the principles of indemnity and has been summarized as follows:

Indemnity is not permitted where the indemnity seeker and the person against whom indemnity is sought breached substantially equal duties owed to the injured person. Where this occurs, the violations produce no great difference in

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gravity of fault as between the joint tortfeasors, and both are on substantially the same plane of moral fault. Both parties being *in pari delicto*, neither will be held in law to be the principal wrongdoer, and therefore neither party will be required to relieve the other of the entire loss.

Hayes v. Wilmington, 243 N.C. 525, 91 S.E. 2d 673 (1956). *See also* 41 Am. Jur. 2d, Indemnity, § 21, p. 710.

By answering affirmatively to the first issue presented, the jury found that Penn was negligent by its own actions and thus that Penn was actively negligent. Since Penn was found to be actively negligent, it was *in pari delicto* with Spradley and was not entitled to indemnity from him. We conclude therefore that the court's error, if any, in failing to submit Penn's crossclaim to the jury was harmless.

In sum, we vacate that part of the judgment entered awarding punitive damages to plaintiff and affirm the remainder of the judgment.

Vacated in part; affirmed in part.

Chief Judge HEDRICK and Judge WEBB concur.

CARL D. JOHNSON AND WIFE, JO ANN JOHNSON v. PAUL C. HOLBROOK

No. 8523SC40

(Filed 15 October 1985)

Fraud § 12.1— release signed without reading— summary judgment for defendant proper

Summary judgment was properly granted for defendant in an action by one joint obligor on a promissory note against the other where the parties had negotiated a settlement of their claims against each other, an attorney hired by a third party prepared an identical release for each, the release was read aloud by the attorney to both parties, and plaintiff did not read the release because he did not have his glasses. Plaintiffs' allegations of fraud were insufficient because there were no assertions that the attorney or defendant intended to misrepresent the nature or contents of the release or that they did in fact misrepresent its nature or contents, the evidence was uncontradicted that the attorney read the entire release out loud, and plaintiff alleged that he

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relied on the representations of the attorney and did not allege any fraud chargeable to defendant or that the attorney and defendant were involved in a common scheme. Plaintiff had a duty to read the document and failed to show any fraud by the defendant.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 24 August 1984 in Superior Court, ASHE County. Heard in the Court of Appeals 27 August 1985.

John P. Siskind for plaintiff appellants.

Vannoy, Moore, Colvard & Triplett, by J. Gary Vannoy and Anthony R. Triplett, for defendant appellee.

BECTON, Judge.

This is an action by one joint obligor on a \$25,000 promissory note against the other for indemnification for one-half of the amount paid on the note. From a summary judgment in favor of the defendant based on a release signed by the plaintiff, plaintiff appeals.

Plaintiff, Carl D. Johnson, and defendant, Paul C. Holbrook, were engaged in a joint business venture. They borrowed \$12,000 from the Northwestern Bank and \$25,000 from J. Frank Pearson. They both signed a promissory note dated 20 April 1978 to Pearson, payable at eight percent interest per annum. Only Johnson signed the \$12,000 note to the bank, and Holbrook gave Johnson two promissory notes, one for \$4,000 and one for \$2,000, for Holbrook's one-half interest in the use of the \$12,000 loan proceeds. On 21 January 1982, a judgment on the Pearson note was entered against Johnson and his wife in favor of Esther Pearson, the executrix of J. Frank Pearson's estate.

On 19 December 1983, Johnson, Holbrook, and William Mitchell, an attorney for Northwestern Bank, met at Mr. Mitchell's office in order to resolve the bank's claim for the \$12,000 note and other disputes between Johnson and Holbrook regarding their past financial transactions. Johnson and Holbrook met alone for some time and then called in Mitchell to reduce to writing the settlement between Johnson and Holbrook. According to the affidavit of Johnson, Johnson agreed to release Holbrook from his obligation for one-half of the \$12,000 bank loan, by releasing all claims to the \$4,000 and \$2,000 notes made by Holbrook to John-

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son, in exchange for \$6,000 in the form of a check and some credits. Johnson alleged in his affidavit that, because he did not have his glasses with him and could not read the documents, he relied on Mitchell's statements as to the purpose of the release. Mitchell was not representing either party to the release, and he received no payment for his services from Johnson or Holbrook.

On 6 January 1984, Johnson filed his Complaint in this action. Holbrook answered and raised the release as an affirmative defense and bar to Johnson's action. Holbrook moved for summary judgment, supported by the affidavits of Holbrook and Mitchell. In each of these affidavits, the affiant indicates that the release was read aloud by Mitchell to both Johnson and Holbrook. The affidavit of Mitchell reads in part as follows:

I inquired of both men if this agreement was a complete and final settlement of everything between the two parties and was advised by each that it was;

I proceeded to dictate in the presence of both men, what I considered to be an absolute, complete and final release of all claims as I knew both of these men had been involved together in considerable ventures over the past fifteen (15) or twenty (20) years;

I dictated one release for both of the parties and reversed the names and amounts so that there was an identical release for each.

The affidavit of Holbrook reads in part:

This affiant and Carl D. Johnson requested W. G. Mitchell to prepare a release reducing their agreement to writing and resolving all prior business transactions;

Said releases were dictated by W. G. Mitchell in the presence of this affiant and Carl D. Johnson and thereafter were signed by the affiant and Carl D. Johnson in the presence of Zelma C. Goforth, a Notary Public.

None of the sworn statements in either of these affidavits is denied by Johnson. Instead, he asserts only that he signed the release without reading it himself because, being without his glasses, he relied on Mitchell's oral statement to him that "the

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paper was for the purpose of releasing Mr. Holbrook of both the \$4,000.00 Note and the \$2,000.00 Note”

Summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure should be granted when there is no genuine issue of material fact and only issues of law remain. *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Taking the facts in a light most favorable to Johnson, the nonmovant in this case, the allegations of fraud and misrepresentation are insufficient as a matter of law to defeat the release signed by Johnson. Therefore, summary judgment was proper.

Johnson admitted executing the release in exchange for valuable consideration. Thus, it is incumbent upon him “to prove any matter in avoidance.” *Carder v. Henson*, 22 N.C. App. 318, 319, 206 S.E. 2d 308, 309 (1974); *Caudill v. Chatham Manufacturing Co.*, 258 N.C. 99, 128 S.E. 2d 128 (1962). Johnson contends that he signed the release in reliance on statements of the attorney, Mitchell. Apparently, Johnson’s argument is that he was fraudulently induced to sign the release. This argument fails on the pleadings for two reasons. First, there are no allegations in the record or in the briefs that would be sufficient to make out a *prima facie* case of fraud: there are no assertions that Mitchell or Holbrook intended to misrepresent the nature or contents of the release or that they did, in fact, misrepresent its nature or contents. The facts, taken in a light most favorable to Johnson, show only that Mitchell told him that the document would release Holbrook from his obligations under the \$2,000 and \$4,000 notes. This is a true representation. There is no allegation that Mitchell represented that the release would preserve Holbrook’s other obligations. The language of the release clearly provides otherwise, and the evidence is uncontradicted that Mitchell read the entire release out loud to both Johnson and Holbrook. The document was notarized and reads as follows:

RELEASE OF ALL CLAIMS

THIS INDENTURE WITNESSETH that in consideration of the sum of \$6,000.00, the receipt of which is hereby acknowledged, CARL D. JOHNSTON, for himself, his heirs, successors and assigns, does hereby release and forever discharge PAUL HOLBROOK, and any other person, firm or corporation charged

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or chargeable with responsibility or liability, their heirs, representatives and assigns, from *any and all claims for indebtedness by reason of any prior transactions whatsoever, including joint ventures, notes, or other evidences of indebtedness, whether the same are surrendered to the undersigned or not.*

This 19th day of December, 1983.

/s/ Carl D. Johnston (SEAL)

(emphasis added).¹

Johnson claims that he believed the release related only to the \$2,000 and \$4,000 notes from Holbrook to Johnson. Nonetheless, Johnson had no right to rely on Mitchell's alleged representations in this case. Johnson had the duty to read what he signed, or, if he could not do so because he did not have his glasses, to postpone the signing until he obtained his glasses. In *Matthews v. Hill*, 2 N.C. App. 350, 163 S.E. 2d 7 (1968), the plaintiff had been injured in an automobile accident. She signed a release "because she didn't want to be bothered." *Id.* at 354, 163 S.E. 2d at 9-10.

An injured person, who can read, is under the duty to read a release from liability for damages for a personal injury before signing it. Hence, where such a person signs a release without reading it, he is charged with knowledge of its contents, and he may not thereafter attack it upon the ground that at the time of signing he did not know its purport, unless his failure to read it was due to some artifice or fraud chargeable to the party released. *Watkins v. Grier, supra*. In the present case there was no evidence of any fraud or artifice used to obtain plaintiff's signature on the release, and she is bound by her act in signing it.

Id.; see *Watkins v. Grier*, 224 N.C. 339, 30 S.E. 2d 223 (1944). In the case at bar, at best, Johnson revealed the existence of a misunderstanding. At worst, he has demonstrated his own negligence in signing the document without reading it himself. Johnson is a literate businessman and is charged with knowledge of the contents of the release he signed. See *Beeson v. Moore*, 31

1. Everywhere else in the record and briefs, "Johnston" appears as "Johnson."

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N.C. App. 507, 229 S.E. 2d 703 (1976), *disc. rev. denied*, 291 N.C. 710, 232 S.E. 2d 203 (1977); *Carder*.

The second reason why fraud has not been pleaded sufficiently is that Johnson allegedly relied on the representations of Mitchell, not the defendant Holbrook. Johnson has not alleged any fraud chargeable to Holbrook, or that Mitchell and Holbrook were involved in a common scheme. In fact, the evidence shows that Johnson and Holbrook both requested Mitchell to assist them and that Mitchell was neither involved in the negotiations nor paid by either Johnson or Holbrook. The alleged fraud must be chargeable to the party released. *Matthews*.

Johnson relies on *Johnson v. Lockman*, 41 N.C. App. 54, 254 S.E. 2d 187, *disc. rev. denied*, 297 N.C. 610, 257 S.E. 2d 436 (1979) for the proposition that whether it is reasonable to fail to read a document before signing a release is a factual question for a jury. *Johnson* is easily distinguished. In *Johnson*, the alleged misrepresentation was made by the defendant's agent, not a third party. In addition, the plaintiff claimed that the agent falsely represented that the plaintiff's insurance policy did not cover his back condition. In the case at bar, Johnson does not deny that Mitchell read the release to Johnson. The language of the release is clear and unequivocal.

In summary, Johnson failed to satisfy his burden of establishing a *prima facie* case of fraud or artifice in order to avoid the release. Johnson admits that he voluntarily signed the release, and he failed to show any fraud by the defendant Holbrook. Johnson had a duty to read the document, and, in any event, failed to deny that it was read to him. There is no genuine issue of material fact to be resolved and summary judgment was appropriate.

For the reasons set forth above, we

Affirm.

Judges WEBB and MARTIN concur.

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STATE OF NORTH CAROLINA v. RONNELL LEVERNE JACKSON

No. 8521SC162

(Filed 29 October 1985)

1. Criminal Law § 29.2— mental capacity to stand trial—jurisdiction to enter commitment order

The superior court, rather than the district court, had authority to enter a commitment order under G.S. 15A-1002 to determine defendant's capacity to stand trial even though indictments had not yet been returned. Furthermore, any impropriety in the entry of such an order by one judge without notice to defendant or his counsel was rendered harmless by a second judge's order entered after defendant and his counsel had notice and an opportunity to be heard concerning the commitment.

2. Criminal Law § 5— notice of insanity defense—inherent power to require submission to mental examination

When a criminal defendant gives notice that he will raise insanity as a defense to the charges against him, the trial court has the inherent power to require the defendant to submit to a mental examination by a state or court-appointed psychiatrist for the purpose of inquiring into his mental status at the time of the alleged offense.

3. Constitutional Law § 74; Criminal Law § 5.1— expert testimony of insanity— rebuttal testimony by prosecution's psychiatrist— statements made by defendant—no violation of right against self-incrimination

When a defendant presents expert testimony in support of his claim of insanity, the prosecution's psychiatrist may testify in rebuttal as to statements made by, or information obtained from, the defendant in the course of his examination of defendant without violating defendant's Fifth Amendment right against self-incrimination. The trial court must, however, limit the jury's consideration of such statements made during the examination to the issue of insanity and not permit their consideration on the issue of guilt.

4. Constitutional Law § 43; Criminal Law § 5— order requiring psychiatric examination—no violation of right to counsel

Although defense counsel should be notified in advance of any order requiring a psychiatric examination of a criminal defendant, defendant's Sixth Amendment right to counsel was not violated by an order entered without notice to defendant or his counsel where such order was superseded by a second order entered after a hearing in which defendant and his counsel participated. Furthermore, since a defendant who pursues an insanity defense may be ordered to undergo a psychiatric examination, he cannot complain that he was denied the assistance of counsel in deciding whether to submit to it, and there is no constitutional requirement that counsel be present during the psychiatric examination.

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5. Criminal Law § 5— order for psychiatric examination—notice of insanity defense not yet given—absence of prejudice

Where defendant had not given formal notice under G.S. 15A-959 of his intent to rely on the defense of insanity at the time the court ordered defendant's commitment to Dorothea Dix Hospital for examination to determine his mental status at the time of the alleged offenses, the order of commitment was premature. However, this was not a fatal defect since defendant thereafter gave the statutory notice and pursued the insanity defense at trial.

6. Criminal Law § 101— alleged juror misconduct—refusal to examine juror

The trial court did not err in the denial of defendant's motion that the court examine a juror concerning whether the juror may have engaged in improper conduct during a trial recess or in the denial of defendant's alternative motion to replace the juror with an alternate where the trial court investigated the allegation of juror misconduct by receiving the testimony of defendant's sister which showed only that the juror, in response to an inquiry by an unknown person as to whether he was serving on defendant's jury, made an ambiguous gesture, and where there was nothing in the record to indicate that the juror engaged in any conversation about the case, or that the person to whom the gesture was directed had any connection with or knowledge of the case except that it was being tried.

7. Kidnapping § 1— indictment for first degree kidnapping

The indictment was insufficient to charge first degree kidnapping where it only alleged the elements of kidnapping set forth in G.S. 14-39(a) but failed to allege one of the elements set forth in G.S. 14-39(b), to wit, that defendant did not release the victim in a safe place, seriously injured the victim, or sexually assaulted the victim. In finding defendant guilty of first degree kidnapping, however, the jury necessarily found facts establishing the offense of second degree kidnapping, and the jury's verdict will be considered a verdict of second degree kidnapping.

8. Criminal Law § 163— submission of greater offense not supported by indictment—plain error

The submission to the jury of an issue as to defendant's guilt of an offense greater than that for which he has been properly indicted is plain error affecting a substantial right which may be reviewed on appeal even though not brought to the attention of the trial court.

9. Criminal Law § 132— insanity issue—verdict not contrary to weight of evidence

The trial court did not abuse its discretion in the denial of defendant's motion to set aside the verdict on the ground that testimony by the State's expert witness was insufficient to rebut the substantial evidence presented in support of defendant's plea of insanity. Even if the State had presented no evidence to rebut defendant's expert testimony that he was insane at the time of the offenses, the credibility of defendant's witnesses on the issue was a matter for jury determination.

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10. Criminal Law § 138— contemporaneous conviction—improper aggravating circumstance

The trial court in a murder and kidnapping trial erred in finding as an aggravating factor for second degree murder that defendant killed his victim while committing first degree kidnapping, since a conviction of an offense covered by the Fair Sentencing Act may not be aggravated by a contemporaneous conviction of a joined offense.

APPEAL by defendant from *Albright, Judge*. Judgments entered 1 October 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 September 1985.

Ronnell Leverne Jackson was indicted for first degree murder in connection with the death of William Norbert Rismiller and for kidnapping Michelle Moser Holland. He entered pleas of not guilty in each case and gave notice of his intent to rely on the defense of insanity and to introduce expert testimony in support of the insanity defense.

At trial, the State's evidence tended to show that on 5 June 1984, at about 10:00 a.m., defendant entered the offices of WJTM, a Winston-Salem television station, armed with a pistol. He encountered Mrs. Holland, a receptionist, and Mr. Rismiller, a station executive, in the reception area. When Mr. Rismiller inquired as to what defendant wanted, defendant shot him. Defendant then forced Mrs. Holland, at gunpoint, to leave the building, get into her automobile, and drive him, according to directions which he gave, to the house where he lived. He then forced her into the house and into a bedroom. Shortly thereafter, police officers arrived at the house. Defendant refused to release Mrs. Holland, or to surrender himself, for approximately six hours.

During the time that defendant and Mrs. Holland were in the house, defendant told her that the television station had been spying on him through its satellite and other electronic equipment. He questioned her concerning the equipment and methods used by the station to spy on him. In addition, he talked to Mrs. Holland about her children and his son, and about oil paintings which defendant had hanging in the house. Defendant also communicated with police officers and demanded that a television news team be sent to the house. He guaranteed that he would not harm the camera crew, but said that he would shoot Mrs. Holland if any police officers attempted to enter the house. When the request

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was denied, defendant demanded that WXII, another television station, broadcast an apology acknowledging that he had been spied on and explaining how it was done. The police arranged for a false broadcast to be carried over the local cable system to a limited area which included defendant's house. Shortly after this broadcast, in which a spokeswoman for the television station apologized for spying on defendant and asserted that it would not happen again, defendant released Mrs. Holland and surrendered himself to police. Throughout the incident, Mrs. Holland and the police officers described defendant as calm, deliberate and coherent. Mr. Rismiller died as a result of the gunshot wound inflicted by defendant.

Defendant offered evidence tending to show that he had, for a number of years, complained to family members, friends and a minister that he was being spied on through television, and that he had broken a number of television sets. He had purchased a newspaper advertisement offering a reward if the people who were spying on him would tell him why they were doing so. He had also contacted a newspaper reporter and a radio station employee concerning his belief that he was being spied upon. Defendant also presented testimony of a clinical psychologist, Dr. Steven Bradbard, and a psychiatrist, Dr. Selwyn Rose, that defendant suffered from severe paranoia. Dr. Rose gave his opinion that at the time of the incident on 5 June 1984 defendant was suffering from severe mental illness and was unable to differentiate between right and wrong.

In rebuttal, the State called Dr. Bob Rollins, a psychiatrist at Dorothea Dix Hospital, who agreed that defendant suffered from paranoia which impaired his judgment. However, in Dr. Rollins' opinion, defendant knew that it was wrong to kill Mr. Rismiller and legally wrong to kidnap Mrs. Holland, though defendant felt that he was justified in doing so.

The jury found defendant guilty of second degree murder and first degree kidnapping. Judgments were entered on the verdicts imposing consecutive sentences of 50 years imprisonment for second degree murder and 40 years imprisonment for first degree kidnapping. Defendant appeals.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General James E. Magner, Jr. for the State.

Gregory Davis for defendant appellant.

MARTIN, Judge.

Defendant assigns error to (1) the entry of an order requiring him to undergo a psychiatric examination, (2) the refusal of the trial court to disqualify a juror for alleged misconduct, (3) the submission of first degree kidnapping to the jury, (4) the denial of his motions to set aside the verdicts, and (5) the sentences imposed. Our review discloses that the offense of first degree kidnapping was improperly submitted to the jury and we must therefore vacate the judgment in case No. 84CRS26931 and remand that case for entry of judgment as upon a verdict of guilty of second degree kidnapping. We also conclude that the court erred with respect to the sentence imposed upon defendant's conviction for second degree murder, and we therefore must remand case No. 84CRS 26930 for a new sentencing hearing. Otherwise, we find no prejudicial error in defendant's trial.

By his first and second assignments of error, defendant contends that the superior court was without authority to order defendant's commitment to Dorothea Dix Hospital for examination to determine his mental status at the time he allegedly committed the offenses. He contends also that the admission of testimony of the state psychiatrist, Dr. Rollins, on the issue of defendant's sanity violated his rights guaranteed by the fifth and sixth amendments to the United States Constitution because the information which provided a basis for Dr. Rollins' opinion was obtained during an unlawful examination. We reject each of these contentions.

Prior to 21 June 1984, defendant moved, through his counsel, for funds for the employment of a private psychiatrist to determine whether defendant knew right from wrong at the time of the offenses. An order was entered in district court allowing the motion. On 21 June 1984, the assistant district attorney filed a motion questioning defendant's capacity to proceed. The motion was evidently communicated by telephone to Judge Freeman, a resident superior court judge, who authorized his secretary to sign for him an order committing defendant to Dorothea Dix Hos-

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pital for examination "to determine the question of the defendant's capacity to proceed, and to determine if defendant knew right from wrong and/or the nature and quality of his acts." The order was entered without notice to defendant or his counsel.

On 25 June 1984, true bills of indictment charging defendant with kidnapping and first degree murder were returned by the grand jury. On 26 June 1984, defendant's counsel filed application for writ of habeas corpus alleging that defendant's commitment to Dorothea Dix Hospital was unlawful. On the following day, a hearing on the return of the writ of habeas corpus was conducted before Judge Seay. Judge Seay found that defendant was being lawfully held without bond pending trial. He also found that defendant's private psychiatrist, Dr. Rose, had access to and had examined defendant while he was at the hospital. He concluded that the prosecutor's motion questioning defendant's capacity to proceed was proper and that, because he would simultaneously order defendant's commitment to the state hospital, it was unnecessary to determine whether Judge Freeman's signature had been improvidently placed on the 21 June 1984 commitment order. Defendant's release was denied and, by separate order, Judge Seay committed defendant to Dorothea Dix Hospital "for observation and treatment pursuant to G.S. 15A-1002 to determine defendant's capacity to proceed and to determine if the defendant knew right from wrong, and or the nature and quality of his acts."

[1] Defendant first argues that Judge Freeman's order of 21 June 1984 was improper because it was entered without notice and because the cases were still within the jurisdiction of the district court, since indictments had not yet been returned. The latter argument is clearly without merit. Pursuant to G.S. 7A-271, the superior court has exclusive, original jurisdiction over all actions in which a felony is charged. With respect to the entry of the order without notice to defendant or his counsel, we observe that while G.S. 15A-1002 expressly permits the prosecutor to question a defendant's capacity to proceed and contains no express provision for notice of such a motion, the requirement that the question of capacity to proceed may only be raised by a motion, setting forth the reasons for questioning capacity, implies that some notice must be given. However, even though we do not approve of the entry of a G.S. 15A-1002 commitment order with-

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out at least minimal notice, we need not expressly decide the issue in this case. This is so because Judge Seay's order committing defendant for the same purposes as the earlier order was entered after indictments had been returned, and after defendant and his counsel had notice and an opportunity to be heard concerning the commitment and examination. Any impropriety in Judge Freeman's order, including the manner in which it was signed, was rendered harmless by Judge Seay's subsequent order.

[2] We next consider defendant's contention that both orders exceeded the court's authority because the orders directed an examination to determine defendant's mental status at the time the alleged offenses were committed. Defendant correctly points out that there is no statutory authority to compel such an examination. G.S. 15A-1002 provides that where capacity to proceed is questioned, the court may order an examination of a defendant for the purpose of "describing the present state of defendant's mental health," or "to determine his capacity to proceed." G.S. 15A-1002(b)(1), (2). The question remains, however, whether the trial court, in the absence of express statutory authorization or prohibition, has the inherent power to require a criminal defendant to undergo a mental examination to determine his sanity at the time of the offense.

In North Carolina insanity is an affirmative defense; a defendant has the burden of proving his insanity to the satisfaction of the jury. *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978). In the absence of such proof, it is presumed that defendant was sane and responsible for his alleged criminal acts. *Id.*

The prosecution may assume, as the law does, that the defendant is sane. The assumption persists until challenged and the contrary is made to appear from circumstances of alleviation, excuse, or justification; and it is incumbent on the defendant to show such circumstances to the satisfaction of the jury, unless they arise out of the evidence against him. [Citation omitted.]

Id. at 65, 248 S.E. 2d at 857. While evidence of sanity or insanity may be provided by lay witnesses, *State v. Moore*, 268 N.C. 124, 150 S.E. 2d 47 (1966), expert psychiatric testimony is "undoubtedly superior to any other method the courts have for gaining access to an allegedly insane defendant's mind." *State v. Wade*, 296

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N.C. 454, 463, 251 S.E. 2d 407, 412 (1979). Where a defendant gives notice of his intent to pursue a defense of insanity, it is not only reasonable, but necessary, that the prosecution be permitted to obtain an expert examination of him. Otherwise there would be no means by which the State could confirm a well-founded claim of insanity, discover fraudulent mental defenses, or offer expert psychiatric testimony to rebut the defendant's evidence where insanity is genuinely at issue. Thus, we believe that the trial court has the authority to order such an examination as a part of its inherent power to oversee the proper administration of justice.

We find support for our decision in *State v. Grayson*, 239 N.C. 453, 80 S.E. 2d 387 (1954). Although the issues present in the case *sub judice* were not directly addressed in *Grayson*, our Supreme Court found no fault with the trial court's order, entered over defendant's objection, directing that defendant submit to a mental examination where defendant had interposed insanity as a defense. Courts of other jurisdictions have also held that a trial court may, in the exercise of its inherent power, order such an examination for the purpose of determining an accused's sanity at the time of the alleged offense. See *Shifflett v. Commonwealth*, 221 Va. 760, 274 S.E. 2d 305 (1981); *Annot.*, 17 A.L.R. 4th 1260 (1982).

[3] Defendant argues further that the admission of testimony by Dr. Rollins as to statements made by defendant during the course of the examination, and of Dr. Rollins' opinions based on those statements, was violative of defendant's fifth amendment right against self-incrimination. He cites *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981) in support of his position. *Smith*, however, is not apposite to the facts before us. In *Smith*, the prosecution offered, at the sentencing phase of a capital trial, testimony of a court-appointed psychiatrist to prove defendant's future dangerousness. The psychiatrist based his opinion on information obtained from defendant during an examination to determine his competency to proceed to trial. Defendant was not warned, before the examination, of his right to remain silent nor was he advised that his statements could be used against him at the sentencing hearing. The Supreme Court held that under those circumstances, the use of the psychiatrist's testimony as substantive evidence of Smith's future dangerousness in order to obtain the death penalty violated his fifth amendment right. In so

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holding, however, the Court specifically noted that Smith had neither introduced psychiatric evidence in his own behalf, nor indicated that he might do so.

When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [Citations omitted.]

Id. at 465, 68 L.Ed. 2d at 370.

This case differs from *Smith*. Only after defendant offered the testimony of Dr. Rose in order to raise the defense of insanity did the State offer the testimony of Dr. Rollins to rebut evidence that defendant was insane at the time of the offense. Defendant, by introducing the testimony of his own psychiatrist concerning information obtained from his examination of defendant, waived his right to invoke the protection of the fifth amendment to exclude testimony by the State psychiatrist as to information obtained from defendant during the court ordered examination. *Varadas v. Estelle*, 715 F. 2d 206 (5th Cir. 1983). Moreover, we note that Dr. Rollins did not testify as to any inculpatory statements made to him by defendant which had not already been placed in evidence through the testimony of Dr. Rose. The trial court correctly instructed the jury that they were to consider the evidence of statements made by defendant to Dr. Rollins only as they established a basis for his opinion as to sanity, and not on the issue of guilt. We find no violation of defendant's privilege against self-incrimination by the admission of Dr. Rollins' testimony.

[4] Finally, as to these assignments of error, defendant contends that the court-ordered psychiatric examination as it dealt with sanity at the time of the offenses was violative of his sixth amendment right to effective assistance of counsel. He bases this contention on the State's failure to notify his counsel, in advance, of the examination ordered by Judge Freeman and of the fact that it would encompass matters other than competency to proceed.

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As previously noted, Judge Freeman's order was superseded by order of Judge Seay. At the time of Judge Seay's order for defendant's examination, both defendant and his counsel were present in court, had an opportunity to be heard concerning the order, and had actual notice of the scope of the examination and therefore, the purposes for which it could be used. Defendant elected to pursue his insanity defense through the testimony of Dr. Rose with full notice that Dr. Rollins was available to testify in rebuttal. Furthermore, since a defendant who pursues an insanity defense may be ordered to undergo such an examination, he cannot complain that he was denied the assistance of counsel in deciding whether or not to submit to it. *Vardas v. Estelle*, *supra*. There is no constitutional requirement that counsel be present during a psychiatric examination to determine sanity. *United States v. Albright*, 388 F. 2d 719 (4th Cir. 1968). Although we are of the opinion that defense counsel should be notified in advance of any order requiring a psychiatric examination of a criminal defendant, we find no violation of defendant's sixth amendment rights under the circumstances of this case.

In summary, we hold that in cases where a criminal defendant gives notice that he will raise insanity as a defense to the charges against him, the trial court has the inherent power to require the defendant to submit to a mental examination by a state or court-appointed psychiatrist for the purpose of inquiring into his mental status at the time of the alleged offense. We also hold that where a defendant presents expert testimony in support of his claim of insanity, the prosecution's psychiatrist may testify in rebuttal as to statements made by, or information obtained from, the defendant in the course of such examination without violating defendant's fifth amendment rights. The trial court must, however, limit the jury's consideration of such statements made during the examination to the issue of insanity and not to the issue of guilt.

[5] We are cognizant that at the time of both orders for commitment to Dorothea Dix, defendant had not given formal notice, as required by G.S. 15A-959, of his intent to rely on the insanity defense. To that extent, the order was premature. However, we do not deem this to be fatally defective inasmuch as defendant thereafter gave the statutory notice and, in fact, pursued the insanity defense and therefore could have been compelled to submit

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to such examination. We cannot see how defendant was prejudiced by undergoing the examination as to sanity at the same time his competency to proceed was being evaluated.

[6] Defendant next assigns as error: (1) the denial of his motion that the court examine a juror concerning an allegation that the juror may have engaged in improper conduct during a trial recess; and (2) the denial of his alternative motion to dismiss the juror and replace him with an alternate. These motions were made at the midday recess on 27 September, after completion of all of the evidence and just before the jury arguments were to commence. At that time, defendant's counsel reported to the court that at the lunch recess on the previous day, one of the jurors was observed to have made a gesture in response to an inquiry from an unknown person as to whether the juror was serving on the jury for defendant's trial. Counsel described the gesture as similar "to a basketball game where Dean Smith puts his hand to his throat after the referee makes a controversial call." The gesture had been reported to defendant's counsel by Ramona Jackson, defendant's sister.

The court, in chambers, examined Ramona Jackson concerning the incident. Her testimony was as follows:

THE WITNESS: I was in Little Pep Restaurant and the jury was walking on the other side of the street and two men coming in Little Pep and they called to them. One of them said I heard you was on the jury for Jackson, and he said yeah, and came on in and after that, two men came out with the two men and came in Little Pep and said I'm going to sit here and have lunch with them. I know I'm not supposed to have lunch with us. After that, I don't know what happened.

THE COURT: Did the juror say anything?

THE WITNESS: When the man said hello, say, yeah. That's when he came and said see if he going to have lunch with him.

THE COURT: Did the juror say anything about the case?

THE WITNESS: No. I didn't hear him say anything.

THE COURT: Just a, a gesture?

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THE WITNESS: Yes.

THE COURT: Did the other people ask him anything about the case or try to give him any information about the case?

THE WITNESS: I didn't hear him because they left out.

THE COURT: Let the record show—she showed that that gesture, when the question was asked to the juror, the juror said yes, and put his hand around his neck. Is that what you are telling me?

THE WITNESS: Yes, like this.

MR. COLE: This happened today or yesterday?

THE WITNESS: Yesterday at lunch time at recess time.

After hearing Ms. Jackson's testimony, the trial judge observed that there was no suggestion that the juror had relayed or received any information and that he did not consider that the reported gesture, the intent of which was subject to differing interpretations, was sufficient to risk the effect that an inquiry of the juror might have on him or on the other jurors. He declined for similar reasons to summarily dismiss the juror.

Where juror misconduct is alleged, it is incumbent upon the trial court to make such an investigation as is appropriate, including examination of the juror involved when warranted, to determine whether or not misconduct has occurred, and if so, whether such conduct has resulted in prejudice. *State v. Drake*, 31 N.C. App. 187, 229 S.E. 2d 51 (1976). This determination must be made on the facts and circumstances present in each case. *Id.* "The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge." *State v. Johnson*, 295 N.C. 227, 234-35, 244 S.E. 2d 391, 396 (1978) (quoting *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915)). The court's ruling on the question of juror misconduct will not be disturbed on appeal unless it is clearly an abuse of discretion. *Stone v. Griffin Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363 (1962); *State v. Sneed*, 274 N.C. 498, 164 S.E. 2d 190 (1968). A denial of motions made because of al-

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leged juror misconduct is equivalent to a finding that no prejudicial misconduct has been shown. *Sneed*, *supra*.

Applying the foregoing rules to the facts and circumstances of this case, we find no abuse of discretion. The trial judge investigated the allegation of juror misconduct by receiving the testimony of defendant's sister, who was a witness obviously interested in the outcome of the trial. Her testimony showed nothing more than that the juror had made a gesture, which, at most, was ambiguous and subject to differing interpretations. There was nothing in the record to indicate that the juror engaged in any conversation about the case, or that the person to whom the gesture was directed had any connection with, or knowledge of, the case except that it was being tried. The trial judge was in a position, after hearing Ramona Jackson's testimony, to determine whether her account of the alleged incident warranted further investigation. He concluded that it did not. An examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous or where the witness did not overhear the juror or third party talk about the case. *Drake*, *supra*. This assignment of error is overruled.

[7] By his final assignment of error relating to the trial, defendant contends that the trial court erred in submitting to the jury the issue of defendant's guilt of first degree kidnapping because the indictment was insufficient to charge that offense. We agree.

The indictment in case No. 84CRS26931 alleged:

Date of Offense: June 5, 1984

Offense in Violation of G.S. 14-39

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully and feloniously did kidnap Michelle Holland, a person who had attained the age of 16 years by unlawfully removing her from one place to another and confining and restraining her without her consent, and for the purpose of holding her as a hostage, and facilitating the flight of the defendant, Ronnell Leverne Jackson following the commission of the felony of murder.

In *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983) our Supreme Court held that while the offense of kidnapping is cre-

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ated and defined by G.S. 14-39(a), the offense of first degree kidnapping is further defined by G.S. 14-39(b) as a kidnapping in which the defendant does not release the victim in a safe place, or in which he seriously injures or sexually assaults the victim. In order to properly indict a defendant for first degree kidnapping, the State must allege not only the applicable elements of G.S. 14-39(a) but also the applicable additional element required by G.S. 14-39(b).

The indictment in this case alleged the essential elements of kidnapping as set forth in G.S. 14-39(a) but did not allege any of the elements of first degree kidnapping as set forth in G.S. 14-39(b). It was, therefore, insufficient to charge defendant with the offense of first degree kidnapping, but was sufficient to support a conviction of second degree kidnapping.

[8] The State, however, maintains that since defendant neither challenged the sufficiency of the indictment at trial nor objected to the submission of the instructions concerning first degree kidnapping, he has waived his right to assert the error on appeal. We disagree. The failure of a criminal pleading to state essential elements of an alleged violation may be asserted on appeal even though no objection was made in the trial court. G.S. 15A-1446 (d)(4). Furthermore, we believe that the submission to the jury of the issue of defendant's guilt of an offense greater than that for which he has been properly indicted is "plain error affecting a substantial right" which may be reviewed on appeal even though not brought to the attention of the trial court. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

This error, however, does not mandate a new trial. The trial court correctly instructed the jury as to each of the elements of kidnapping as required by G.S. 14-39(a), thus the jury, in convicting defendant of first degree kidnapping, necessarily found all of the facts required for conviction of second degree kidnapping. Therefore, we will consider the jury's verdict to be a verdict of guilty of second degree kidnapping, vacate the judgment imposed upon the verdict of guilty of first degree kidnapping in case No. 84CRS26931, and remand the case to the Superior Court of Forsyth County for judgment and resentencing as upon a verdict of guilty of second degree kidnapping. *See State v. Bell*, 311 N.C.

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131, 316 S.E. 2d 611 (1984); *State v. Baldwin*, 61 N.C. App. 688, 301 S.E. 2d 725 (1983).

[9] Defendant next assigns error to the denial of his post-trial motions to set aside the verdicts as being contrary to the weight of the evidence. He argues that Dr. Rollins' testimony was insufficient to rebut the substantial evidence presented in support of defendant's plea of insanity.

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the trial court, whose ruling on the motion will not be disturbed absent an abuse of discretion. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976); *State v. Hageman*, 56 N.C. App. 274, 289 S.E. 2d 89, *aff'd*, 307 N.C. 1, 296 S.E. 2d 433 (1982). Defendant had the burden to satisfy the jury on the issue of his insanity. Even if the State had presented no evidence to rebut the expert testimony that defendant was insane at the time of the offenses, the credibility of defendant's witnesses on the issue was a matter for jury determination. *State v. Leonard*, *supra*. "A diagnosis of mental illness by an expert is not in and of itself conclusive on the issue of insanity." *Id.* at 65, 248 S.E. 2d at 857. Except as previously discussed with regard to first degree kidnapping, we find no error in the trial court's refusal to disturb the verdicts.

[10] Finally, we reach defendant's assignments of error relating to the sentences imposed. In case No. 84CRS26930, in which defendant was convicted of second degree murder, the trial court found, as the sole aggravating factor, that "Defendant shot and killed his victim while committing 1st degree kidnapping." This finding must be held to be error. "[A] conviction of an offense covered by the Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with such offense." *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d 223 (1985). Therefore, we must remand the second degree murder conviction for a new sentencing hearing.

Defendant also assigns error with respect to the sentence imposed for first degree kidnapping. Because we vacate that judgment and remand for entry of judgment as upon a verdict of guilty of second degree kidnapping, and a sentencing hearing for that offense, we deem it unnecessary to address this assignment of error.

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No. 84CRS26930—second degree murder—no error in the trial; remanded for new sentencing hearing.

No. 84CRS26931—kidnapping—judgment vacated and remanded for judgment and new sentencing hearing.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. KENNETH PRESLAR HAMILTON

No. 8520SC185

(Filed 29 October 1985)

1. Criminal Law § 53.1— homicide—expert testimony as to cause of death—properly admitted

The State did not err in a prosecution for murder by admitting over a general objection the testimony of an assistant *medical examiner* regarding the cause of death. A general objection to specific opinion testimony will not suffice to preserve the question of the expert's qualifications in the absence of a special request to qualify the witness as an expert. Moreover, the witness's qualifications, position as assistant medical examiner, and testimony regarding the number of cases he had seen indicated sufficient expertise. G.S. 8C-1, R. Ev. 103(a), G.S. 130A-380.

2. Homicide § 21.3— evidence that defendant caused death—sufficient

The evidence in a murder prosecution was sufficient to go to the jury on whether shots fired during an incident caused the victim's death where the victim was alive and active during the incident, received gunshot wounds to his upper body from extremely close range which made him go limp and fall to the sidewalk, an ambulance had to be summoned, and six hours later the victim was dead of gunshot wounds to his upper body roughly equal in number to the shots fired during the incident.

3. Criminal Law §§ 33.4, 75.9— homicide—custodial statement—inflammatory—relevant to malice

The trial court did not err in the murder prosecution of an off-duty police officer for the killing of a black man by admitting custodial statements by the police officer that he believed the law in Anson County did not prevent the killing of blacks. The court found after a *voir dire* that no officer asked defendant any questions and that the statements were completely voluntary, the record contains no evidence of police conduct that the officers should have known was reasonably likely to elicit incriminating statements, defendant's statements clearly tended to prove malice, and while the statements may have tended to invoke emotional responses, G.S. 8C-1, R. Ev. 403, they were also relevant for the same reasons.

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4. Homicide § 18.1— fight between victim and defendant—evidence of premeditation—sufficient

There was sufficient evidence to submit murder to the jury in a case arising out of a struggle between an off-duty police officer and a man with a history of violent paranoid schizophrenia who approached the defendant's truck and began struggling with defendant where there was evidence of premeditation and deliberation in defendant's repeated statements that he was going to kill the victim, defendant's request for his second gun, defendant's immediate attempt to get his second gun, and defendant's unholstering of his first gun when physically separated from the victim, and where there was evidence of malice in defendant's volunteered statements following arrest and the fact that defendant fired his gun at close range until there were no bullets left.

5. Homicide § 21.8— self-defense—evidence sufficient to go to jury

There was sufficient evidence in a murder prosecution to go to the jury on the question of whether defendant was the aggressor and did not act in self-defense, and the court did not err by refusing to give a peremptory instruction for defendant on self-defense, where defendant and the victim had been physically separated by a law officer positioned between them and the original struggle broken up, defendant then repeated his intention to kill the victim, and defendant either pulled out a pistol or suddenly reached for a box where a second pistol was known by the victim to be located, provoking the fatal encounter.

6. Criminal Law § 163— assignment of error to jury instruction—no plain error

Defendant could not assign error to the court's instruction defining and applying the law of aggression in a murder prosecution where defendant did not specifically request any instructions on the subject other than a peremptory instruction and, in response to the court's inquiry following the charge, defendant indicated that he had no corrections or additions other than those previously requested. Moreover, there was no plain error in the court's instructions warranting a new trial. App. Rule 10(b)(2).

7. Homicide § 30.3— murder—failure to instruct on involuntary manslaughter—no error

The trial court did not err in a murder prosecution by refusing to instruct on involuntary manslaughter where defendant repeatedly stated his intention to kill the victim, defendant drew his gun after the two men were physically separated, defendant testified elsewhere that the victim fired the first shot, and the victim was shot a number of times at close range.

8. Criminal Law § 163— homicide—assignment of error to instructions—no plain error

Defendant did not properly raise on appeal in a murder case questions as to the jury instructions on excessive force, burden of proof, and accident where defendant did not present his questions separately and failed to object at trial; nevertheless, there was no plain error in the instructions.

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APPEAL by defendant from *Helms, Judge*. Judgment entered 14 September 1984 in Superior Court, ANSON County. Heard in the Court of Appeals 25 September 1985.

Defendant was tried on an indictment, proper in form, for the murder of Roswell Smith. The State's evidence tended to show:

In the early morning of 4 May 1984 defendant, a white male off-duty police officer, parked his pickup truck near a convenience store in Morven, North Carolina. Smith, a black man with a history of severe, violent paranoid schizophrenia, customarily stood during the day near the spot where defendant parked. For reasons unknown, Smith came around to defendant's driver's side window, reached in, and began struggling with defendant. They struggled over defendant's gun which he had in a holster on the seat. The storekeeper and others came over and defendant shouted for them to get his other gun which was in a box. Defendant said he was going to kill Smith. Defendant repeated this statement in the ensuing minutes.

The storekeeper tried to separate the two men but could not. He called the sheriff's department and a deputy arrived shortly. Both men still held onto the holstered gun. The deputy asked them to let go of it, but neither one released the gun. The deputy wrestled with them and separated Smith from defendant, positioning himself in between. Defendant still had his gun.

At this point, one State's witness testified that defendant stepped out of his truck and pulled his gun out of its holster. He cocked the gun, repeating that he would kill Smith. Another State's witness testified that defendant reached for the box with the second gun in it as soon as the deputy got Smith away from him.

Smith jumped around the deputy, grabbed the gun being held by defendant and the two fell back into the truck, with the deputy on top of them trying to separate them. Shots went off. The deputy was hit in the face by something and ducked away. Smith received several gunshot wounds and died as a result.

Defendant's evidence tended to show that he had begged on-lookers to help him while he was struggling with Smith, but no one did and that Smith attempted to shoot defendant with defendant's gun and fired first, after which defendant turned the gun on

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Smith and fired until no bullets were left. Smith was very muscular and had an extensive history of violent behavior, including verbally abusing passing motorists and attempting to enter their stopped vehicles. Defendant also presented extensive evidence of his good character.

The jury was charged on murder in the first and second degree, voluntary manslaughter, and acquittal. Defendant requested, but did not receive, instructions on involuntary manslaughter. Upon a verdict of guilty of voluntary manslaughter, which carries a presumptive sentence of six years, the court sentenced defendant to four years. The court found in mitigation that defendant acted under strong provocation and that he was a person of good character or reputation. The court allowed defendant to post bond pending this appeal.

Attorney General Thornburg, by Assistant Attorneys General Steven F. Bryant and Karen E. Long, for the State.

Henry T. Drake for defendant-appellant.

EAGLES, Judge.

Defendant argues six questions. We have examined them carefully but have found no prejudicial error.

I

[1] The State presented an assistant State medical examiner who examined Smith's body. At the conclusion of the medical examiner's testimony on direct examination, the prosecutor asked his opinion as to the cause of Smith's death. Defendant entered a general objection, which was overruled, and is the basis for his first assignment of error.

We note initially that a general objection, if overruled, is ordinarily not effective on appeal. G.S. 8C-1, R. Ev. 103(a); 1 H. Brandis, N.C. Evidence Section 27 (1982). In the absence of a special request to qualify a witness as an expert, a general objection to specific opinion testimony will not suffice to preserve the question of the expert's qualifications, even on ultimate issues. *State v. Hunt*, 305 N.C. 238, 287 S.E. 2d 818 (1982). If the witness' evidence indicates that he is in fact qualified to give the challenged opinion, even a timely specific objection will not likely be sustained on appeal. See *Id.*; *State v. Hill*, 32 N.C. App. 261, 231 S.E. 2d 682 (1977). While the record does not contain an extensive review of this witness' qualifications, his position as assistant

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medical examiner and his testimony regarding the number of other cases he had seen indicate sufficient expertise to allow us to conclude that the trial court did not err in admitting his opinion of the cause of death. *See* G.S. 130A-380.

[2] Defendant also attempts to argue under this assignment that the State failed to prove that any wounds received by Smith in this incident actually caused his death, implying that death may have resulted from other unknown causes. The State need not prove that the defendant's acts were the sole and immediate cause of death. *State v. Alford Jones*, 290 N.C. 292, 225 S.E. 2d 549 (1976) (intervening negligence no excuse); *State v. Luther*, 285 N.C. 570, 206 S.E. 2d 238 (1974) (assault precipitated heart attack). Further, the State need not exclude every other possible hypothesis inconsistent with defendant's guilt. *State v. Freddie Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). Here the State's evidence showed that Smith was active and alive during the incident, that he received gunshot wounds to his upper body from extremely close range which made him go limp and fall to the sidewalk, that an ambulance had to be summoned, and that six hours later Smith was dead of gunshot wounds to his upper body roughly equal in number to the number of shots fired during the incident. We think this evidence sufficed to go to the jury on the issue of whether the shots fired during the incident caused Smith's death. We note in response to defendant's speculations on appeal about other possible causes of death, that it was not obligatory for the State to disprove every other conjectured cause of death. *Id.* The assignment is therefore overruled.

II

[3] Defendant was arrested in the afternoon following the incident. While he was being fingerprinted, but before his rights were read to him, defendant made several comments. At one point he said, "It's not against the law to kill a nigger in Anson County." Following *voir dire*, the court found as fact, *inter alia*, that no officer asked defendant any questions and that the statements were "completely voluntary." Defendant now assigns error to their admission.

Defendant made no exceptions to any of the findings of fact. Accordingly they are binding here. *State v. Colbert*, 65 N.C. App. 762, 310 S.E. 2d 145, *rev'd on other grounds*, 311 N.C. 283, 316

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S.E. 2d 79 (1984). The findings of fact establish that the statements were entirely voluntary and that there was no constitutional barrier to their admission. Even if the findings were not conclusive, this record contains no evidence of police conduct that the officers should have known was reasonably likely to elicit the incriminating statements. See *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297, 100 S.Ct. 1682 (1980); *State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983). The mere fact that defendant was in custody does not make his statements *ipso facto* inadmissible. There must be some interrogation. *Id.* Here, there was no interrogation. Defendant's constitutional arguments are without merit.

Defendant also attacks the admission of these statements on the grounds that their inflammatory effect outweighed their relevance. Evidence traditionally has been considered relevant in a criminal prosecution if it has "any logical tendency, however slight, to prove a fact in issue." 1 H. Brandis, N.C. Evidence Section 77 at 285 (1982). The new Rules of Evidence did not substantially alter this liberal definition of relevancy. G.S. 8C-1, R. Ev. 401. Malice is one of the elements of murder. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). Malice is *inter alia* a state of mind which prompts one person to take the life of another without just cause, excuse or justification. *State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978). Statements by defendant that he believed the law in Anson County did not prevent the killing of blacks clearly tended to prove malice.

Regardless of a statement's relevancy, the court retains discretionary authority to exclude it if its probative value is substantially outweighed by its unfairly inflammatory effect. G.S. 8C-1, R. Ev. 403; 1 H. Brandis, N.C. Evidence Section 80 (1982). Generally, however, courts have excluded such evidence only when it served exclusively to inflame. See e.g., *State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979) (murder case, error to admit evidence of unrelated sodomy). If the evidence is relevant, however, the *Simpson* opinion's logic does not apply. See *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978) (admitted evidence highly prejudicial for the same reason that it was relevant; no error). While the disputed evidence may have tended to evoke emotional responses, it was also highly relevant for the same reasons, as discussed above. The court did not abuse its discretion in refusing to exclude the statements. The assignment is overruled.

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III

Defendant's next argument combines three separate assignments of error, regarding (1) the denial of defendant's motion to dismiss and (2) the court's instructions on who was the aggressor. Defendant has ignored the mandate of Rules of Appellate Procedure that "[e]ach question shall be separately stated." App. R. 28(b)(5). Nevertheless, despite the Rule violation we address those aspects of this argument which are properly before us.

A

[4] Whether there is sufficient evidence to go to the jury can be one of the most difficult questions a court faces in a criminal case. *State v. Bell*, 65 N.C. App. 234, 309 S.E. 2d 464 (1983), *aff'd*, 311 N.C. 299, 316 S.E. 2d 72 (1984) (per curiam). Upon a timely motion to dismiss, the evidence must be considered in the light most favorable to the State, with all favorable and reasonable inferences and inferences. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Once substantial evidence is before the jury, any conflicts and discrepancies are for the jury to resolve and do not supply basis for dismissal. *State v. Greene*, 278 N.C. 649, 180 S.E. 2d 789 (1971); *see State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972). This applies even where defendant presents no evidence. *Id.* If defendant does present evidence, it is disregarded on his motion to dismiss except to the extent that it is favorable to the State. *Earnhardt*, *supra*. In "borderline" or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals. *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297, *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973); *State v. Holt*, 90 N.C. 749 (1884); *Cunningham v. Brown*, 62 N.C. App. 239, 302 S.E. 2d 822, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 754 (1983). With these considerations in mind, we conclude that the court properly denied defendant's motions to dismiss and submitted the case to the jury.

There was sufficient evidence of premeditation and deliberation in defendant's repeated statements that he was going to kill Smith, his requests for his second gun and in his immediate attempt to get his second gun or in unholstering his first gun when physically separated from Smith. *See State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978). There was sufficient evidence of

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malice in defendant's voluntary statement following arrest and the fact that he fired his gun several times at Smith at extremely close range (until there were no bullets left). *See State v. Fleming, supra*. Of the three elements of murder and voluntary manslaughter, *see Id.*, only the unlawfulness of the killing is seriously disputed here. Defendant's contention is that the killing was justified as a matter of law by self-defense and that all the evidence showed that Smith was at all times the aggressor.

B

[5] A person who kills another is not guilty of murder if the killing was an act of self-defense. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974). The right to kill another in self-defense may be forfeited not only by physical aggression on the accused's part but by conduct provoking the fatal encounter. *State v. Sanders*, 303 N.C. 608, 281 S.E. 2d 7, *cert. denied*, 454 U.S. 973, 70 L.Ed. 2d 392, 102 S.Ct. 523 (1981). In *Sanders*, defendant could properly be found the "aggressor" even though he was imprisoned, since defendant taunted the deceased jailer to enter his cell with vile names and verbal abuse. *See State v. Baldwin*, 184 N.C. 789, 114 S.E. 837 (1922) (defendant provoked fatal encounter with language calculated to start fight; jury could properly find him aggressor, even though deceased advanced on him with loaded pistol); *see also State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970) (analyzing circumstances under which adulterous conduct might affect right of self-defense). The fact that the deceased initiated physical contact does not automatically excuse aggressive conduct on defendant's part. *See State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973) (deceased lunged at defendant after defendant sought out deceased and approached him brandishing shotgun; no self-defense).

The State bears the burden of proving that defendant did not act in self-defense. *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979). To survive a motion to dismiss, the State must therefore present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that defendant did not act in self-defense. *State v. Earnhardt, supra*; *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781, *reh'g denied*, 444 U.S. 890, 62 L.Ed. 2d 126, 100 S.Ct. 195 (1979).

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Here there was evidence that defendant and Smith had been physically separated with a law enforcement officer positioned between them. The original struggle had been broken up and stopped. Defendant then repeated his intention to kill Smith and either pulled out a pistol or suddenly reached for the box where a second pistol was known by the victim to be located, provoking the fatal encounter. This evidence sufficed to go to the jury on the question of whether defendant was the "aggressor." Defendant relies heavily on the evidence that Smith reached into his truck in the first instance and then jumped back in on top of him after the two had been separated. At best, this evidence presented a conflict in the State's evidence, which was for the jury to resolve. *State v. Bolin, supra*.

Our decision in *State v. Haight*, 66 N.C. App. 104, 310 S.E. 2d 795 (1984), supports this conclusion. There deceased roughed up one of defendant's companions, abused and threatened defendant, and seemed intent on a violent confrontation. As deceased came toward defendant, defendant fired the fatal shot. Even though mortally wounded, deceased then chased and assaulted defendant. In *Haight*, however, there was evidence that deceased had committed no overt act at the time the shot was fired. We held that there was sufficient evidence to go to the jury on the question whether or not defendant was the aggressor. See also *State v. McConnaughey*, 66 N.C. App. 92, 311 S.E. 2d 26 (1984) (similar facts and result). We likewise hold that in the instant case there was sufficient evidence to go to the jury.

C

Defendant requested an instruction "[t]hat the Court instruct the Jury that Ken Hamilton was not the aggressor, and that Smith was the aggressor." The court declined to give the requested instruction, which appears to be a peremptory instruction requiring the jury to accept as established a crucial and controverted fact. Peremptory instructions are only rarely proper in criminal cases. Only when uncontradicted evidence clearly establishes a fact beyond a reasonable doubt is a peremptory instruction appropriate. *State v. Bowen*, 67 N.C. App. 512, 313 S.E. 2d 196, *appeal dismissed*, 312 N.C. 79, 320 S.E. 2d 405 (1984) (*per curiam*). That was not the situation here and the court correctly refused to give the requested instruction.

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D

[6] Defendant also argues under this assignment that the court's instructions defining and applying the law of aggression were erroneous. Defendant did not specifically request any instructions on the subject (other than the one discussed above), and in response to the court's inquiry following the charge he indicated that he had no corrections or additions other than those previously requested. Defendant therefore cannot assign error to the instructions given. App. R. 10(b)(2). We have reviewed the complained of instructions and do not find "plain error" warranting a new trial. See *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

IV

[7] Defendant next assigns error to the court's refusal to instruct on involuntary manslaughter. The court must instruct on all substantial features of the case arising upon the evidence. *State v. Davis*, 66 N.C. App. 334, 311 S.E. 2d 311 (1984). Involuntary manslaughter is "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). Defendant grounds his contention on his testimony, otherwise unsupported, that Smith grabbed the gun and that it accidentally discharged during the struggle over it. We do not think this evidence sufficed to support an instruction on involuntary manslaughter, in view of defendant's repeatedly stated intention to kill Smith, his action in drawing the gun after the two men were physically separated, his testimony elsewhere that Smith fired the first shot, and the fact that Smith was shot a number of times at close range.

The appellate courts of this State have consistently held that it would be error to instruct on involuntary manslaughter on similar facts when the only evidence of accident has been oral assertions by the defendant, especially where the defense has relied on self-defense. See *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980) (self-defense raised; defendant admitted firing toward deceased but not trying to hit him); *State v. Redfern*, *supra* (defendant's acts naturally dangerous to human life); *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983) (defendant and deceased scuffled; defendant had made threats, shot victim repeatedly); *State v.*

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Davis, supra (intentional brandishing of knife naturally dangerous, fatal consequences in scuffle probable). Accordingly, we conclude that no error occurred here. We note that this Court recently held that involuntary manslaughter is not a lesser included offense of murder. *State v. Fournier*, 73 N.C. App. 465, 326 S.E. 2d 84 (1985).

V

[8] In his last two questions, defendant assigns error to various jury instructions on excessive force, burden of proof, and accident. In disregard of the rules, defendant has not presented his questions separately, App. R. 28(b)(5), and failed to object at trial to the errors now alleged. App. R. 10(b)(2). These questions are accordingly not properly before us. Nevertheless, we have reviewed the instructions and find no "plain error." *State v. Odom, supra*. These assignments are overruled.

VI

For the foregoing reasons, we conclude that defendant has failed to show that he received other than a fair trial, free from prejudicial error.

No error.

Judges WHICHARD and COZORT concur.

STATE OF NORTH CAROLINA v. BOBBY GENE BARE

No. 8423SC1279

(Filed 29 October 1985)

1. Constitutional Law § 51— delay between indictment and trial—no denial of constitutional right to speedy trial

Defendant was not denied his constitutional right to a speedy trial by a nine and one-half month delay between his indictment and trial where defendant failed to show that the delay was unreasonable, the result of the State's negligence or prejudicial to defendant's defense. Sixth and Fourteenth Amendments to the U. S. Constitution; Art. I, § 18 of the N. C. Constitution.

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2. Criminal Law § 91— deadline for trial to begin—order controls over transcript

The trial court's signed order rather than the transcript controlled in determining that the trial court intended to set the deadline for defendant's trial to begin at the "July Term" rather than on the "9th of July" for speedy trial purposes. G.S. 15A-703(a).

3. Criminal Law § 91— continuance because of unavailable prosecution witnesses—exclusion of time from speedy trial period

The trial court properly granted a continuance to the State and properly excluded the time of the continuance from the statutory speedy trial period under either G.S. 15A-701(b)(3) or (7) when two witnesses failed to arrive from California and were unavailable because they were afraid after having received threatening telephone calls, where the State had been in contact with the witnesses, paid for and arranged for their trip to North Carolina, forwarded airline tickets to them and sent the sheriff to the airport to meet them, and where the State had no prior reason to attempt to compel the presence of the witnesses because they had been cooperative until they received the threatening telephone calls.

4. Homicide § 30.2— failure to instruct on voluntary manslaughter—insufficient evidence of heat of passion on sudden provocation

There was no evidence in this murder case that defendant acted in the heat of passion on sudden provocation so as to require the trial court to instruct on voluntary manslaughter where the State's evidence did not show that defendant shot the victim only after being provoked; defendant's testimony that the victim used one vulgar phrase, told defendant, "We're not leaving until we take what we came after," and stated, "Punk, show me you've got a gun," did not indicate that the victim threatened defendant; and the only testimony as to the reason defendant pulled the trigger was defendant's own testimony that the gun discharged by accident when the victim grabbed for it.

5. Criminal Law § 138— mitigating circumstances—compulsion—provocation and extenuating relationship—insufficient evidence

The trial court did not err in failing to find as mitigating circumstances for second degree murder that the crime was committed under compulsion and that there was provocation by the victim and an extenuating relationship between defendant and the victim where defendant's evidence showed only that defendant was in a state of emotional turmoil and was trying to keep his baby from being taken away from him by his former girlfriend's mother and the victim, and that the victim challenged defendant to produce the shotgun he said he had; defendant testified at the sentencing hearing that the shooting of the victim was an accident; and there was no evidence that the victim displayed or threatened to display a weapon. G.S. 15A-1340.4(a)(2)b, i, m.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 26 July 1984 in Superior Court, ASHE County. Heard in the Court of Appeals 29 August 1985.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

BECTON, Judge.

Defendant, Bobby Gene Bare, and Yolanda Cooley had a daughter, Winter Bare, in February 1983. In August 1983, they were living in Ashe County, North Carolina, when Yolanda signed papers making defendant the legal guardian of Winter Bare; Yolanda then moved to Kentucky to work for the Job Corps. Defendant stayed in contact with Yolanda, tried to convince her to move back to North Carolina and proposed marriage, but Yolanda declined. In October 1983, Yolanda traveled to Ashe County with her mother, Laticia Cooley, and her mother's boyfriend, Matthew Anderson. When they arrived in Ashe County, they sought the help of the sheriff in taking the baby, Winter Bare, from the defendant. The sheriff advised them to get a court order. Yolanda contacted defendant, met with him at the defendant's father's home, and indicated that she wanted her mother (Laticia Cooley) to take the baby to California. Defendant strongly opposed the idea of Laticia and her boyfriend taking the baby, and defendant took a rifle and the baby to his sister's house.

At his sister's house, defendant asked his brother-in-law if he could borrow a gun. Defendant started to leave in his car, but a van was at the end of the driveway with Laticia and Matthew Anderson in the front seat. At trial, Laticia testified in part as follows: She approached defendant's car and noticed a gun next to his seat. She asked, "What's going on? Where's the baby?" Defendant said no one would take his baby, and Laticia returned to the van. She heard a gunshot and saw Anderson's face covered with blood. Defendant then threatened to shoot her, but defendant's father came and took the gun from defendant without resistance.

According to defendant's testimony, Anderson had taunted and threatened defendant, told defendant to show Anderson the shotgun, and grabbed the barrel of the shotgun when defendant produced it. Defendant claims the gun discharged by accident when Anderson grabbed it. Apparently, defendant asserts, in the

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alternative, that Anderson provoked defendant into firing the gun.

Defendant was convicted of second degree murder and was sentenced to fifty years imprisonment. On appeal, defendant asserts that the trial judge erred by (1) denying defendant's motion to dismiss for the State's failure to provide a speedy trial; (2) failing to instruct the jury on the charge of voluntary manslaughter; and (3) failing to find certain statutory mitigating factors supported by the evidence. We find no error.

I

[1] Defendant contends that he was denied a speedy trial on both constitutional and statutory grounds. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 18 of the North Carolina Constitution guarantee the right to a speedy trial. In *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972), the United States Supreme Court set forth the factors to consider in determining whether a trial has been unconstitutionally delayed: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) the prejudice to the defendant. *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984). These factors were adopted as the standard under North Carolina constitutional law. See *id.*; *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976) and cases cited therein.

The length of a delay is not determinative of whether a violation has occurred. *Jones*, 310 N.C. at 721, 314 S.E. 2d at 533. The issue must be resolved on the facts of each case, and the defendant has the burden of establishing "that the delay was purposeful or oppressive or by reasonable effort could have been avoided by the State." *Smith*, 289 N.C. at 148, 221 S.E. 2d at 250.

The right to a speedy trial is necessarily relative, for inherent in every criminal prosecution is the probability of delay. . . . Undue delay which is arbitrary and oppressive or the result of deliberate prosecution efforts "to hamper the defense" violates the constitutional right to a speedy trial.

Id. (citation omitted); see *Jones* (delay of seven months not *per se* unreasonable or prejudicial); *State v. Hill*, 287 N.C. 207, 214 S.E.

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2d 67 (1975) (delay of twenty-two months not of great significance; merely triggered speedy trial issue).

Defendant has failed to show that the delay in this case was unreasonable, the result of the State's negligence or prejudicial to defendant's defense. The delay was approximately nine and one-half months. The Ashe County Criminal Superior Court only has three regular sessions each year—March, July and October. Defendant was indicted on 10 October 1983. At the March 1984 session, the State moved for a continuance because two essential witnesses failed to arrive from California. The State had been in contact with the witnesses, paid for and arranged their trip to North Carolina, forwarded the airline tickets to them and sent the sheriff to the airport to meet them. They did not show up because they had received threatening telephone calls and were fearful. This does not amount to wilful or negligent action by the State. *See State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984). And although defendant was incarcerated before trial, bail was set (even though he was charged with first degree murder), and defendant has not shown any prejudice to his defense as a result of this incarceration.

Defendant also contends that his statutory right to a speedy trial under N.C. Gen. Stat. Secs. 15A-701 and -702 (1983) was violated. G.S. Sec. 15A-701 provides in part:

(a1) The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:

(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last.

G.S. Sec. 15A-702 provides that in counties with limited numbers of court sessions, a defendant not brought to trial within the time specified by G.S. Sec. 15A-701 may petition the court for a prompt trial, and then, "(b) The judge with whom the petition for prompt trial is filed may order the defendant's case be brought to trial within not less than 30 days." This order is discretionary with the trial court. *See State v. Parnell*, 53 N.C. App. 793, 281 S.E. 2d 732 (1981).

[2] Defendant asserts two arguments regarding the statutory speedy trial requirements. First, because the trial court ordered a

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prompt trial to begin on 9 July 1984, and the trial began on 23 July 1984, the charge against defendant must be dismissed under N.C. Gen. Stat. Sec. 15A-703(a) (1983). As defendant points out, the transcript indicates that the court ordered "that the case be set for trial in the month of July 1984, for a two week term beginning the 9th of July, 1984." As the State points out, the record shows the court ordered that the time be excluded for the period from 19 March 1984 through the "July Term 1984." It is not clear whether the trial court intended to set the deadline for the trial to begin as the "9th of July" or the "July Term." It was clearly a discretionary order, *see Parnell*, and we conclude that the signed Order, rather than the transcript, controls, thus excluding the time through the "July Term 1984."

[3] Defendant's second contention under the speedy trial statute is that the time period from 19 March through 23 July 1984 was improperly excluded under G.S. Sec. 15A-701(b)(3)(b), which provides:

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

* * *

(3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered

* * *

(b) Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

The trial court apparently excluded the time pursuant to G.S. Sec. 15A-701(b)(7):

ORDER

Considering the factors set forth in G.S. 15A-701(b)(7), the Court finds as a fact that the ends of justice served by granting the continuance outweigh the best interests of the

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public and defendant in a speedy trial and therefore grants the continuance for the reasons above. The Court orders that the following time be excluded in determining whether a trial has been held within the time limits established by G.S. 15A-701.

Time Period (From)	March 19, 1984
Time Period (Through)	July Term 1984

In *Jones*, 310 N.C. at 719, 314 S.E. 2d at 531, the Supreme Court, quoting G.S. Sec. 15A-701(b)(7), noted that time is properly excluded as long as the judge who grants the continuance finds that "the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding." The Court then went on to examine the continuances granted to the State.

We conclude that there was no error in granting the continuance to the State because two witnesses were unavailable. As mentioned above, the State had no reason prior to the March trial date to attempt to compel the presence of the witnesses because they had been cooperative until they received threatening telephone calls. The State had paid for two airline tickets, forwarded them to the witnesses, and maintained contact with them. A sheriff was sent to the airport to pick them up. The record supports the exclusion of time under either G.S. Sec. 15A-701(b)(3) or (7). We find no error in the trial court's order. See *State v. Melton*, 52 N.C. App. 305, 278 S.E. 2d 309 (1981).

II

[4] Defendant contends that the trial court erred by failing to instruct the jury on the lesser included offense of voluntary manslaughter. Defendant argues that the evidence supports an inference that he had acted under the emotional strain of facing the loss of his child and the rejection of the woman he wanted to marry. Defendant claims that the facts were sufficient to show heat of passion on sudden provocation and to entitle him to the instruction on voluntary manslaughter. See *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979). In order to succeed on this theory, there must be evidence that (1) defendant shot Mr. Anderson in the heat of passion; (2) defendant's passion was sufficiently

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provoked; and (3) defendant did not have sufficient time for his passion to cool off. *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983). These elements may be shown by defendant's own or by the State's evidence. *Id.*

The defendant did not satisfy this burden. There is no evidence that the defendant acted in the heat of passion on sudden provocation sufficient under the law in this State. First, the State's evidence does not show that the defendant shot Anderson only after being provoked. The State's eyewitness said only that defendant shot Anderson. Second, defendant's testimony does not, as defendant asserts, indicate that Anderson threatened defendant. Defendant testified only that Anderson used one vulgar phrase; said to defendant, "We're not leaving until we take what we came after"; and responded to defendant's warning that defendant had a gun by saying, "Punk, show me you've got a gun." Finally, and more importantly, the only testimony as to the reason defendant pulled the trigger was defendant's own testimony that the gun discharged by accident when Anderson grabbed for it. In *Montague*, the Supreme Court discussed the legal implications of such evidence:

Mere words however abusive are not sufficient provocation to reduce second-degree murder to manslaughter. Legal provocation must be under circumstances amounting to an assault or threatened assault. *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975).

. . . The State's evidence does not permit a reasonable inference that the killings resulted from such provocation as would temporarily dethrone reason and displace malice. Defendant's evidence tended to show that he did not *intentionally* assault anyone with a deadly weapon and if anyone was fatally injured by the use of his weapon, it was accidental or at most the injury proximately resulted from his culpable negligence. Therefore, defendant's evidence, if believed, would support a verdict of not guilty by reason of accident or a verdict of involuntary manslaughter, both of which were properly submitted by the trial judge. His evidence was not consistent with a mitigation of second-degree murder to voluntary manslaughter on the ground that he acted under the influence of heat of passion upon sudden provocation.

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298 N.C. at 757, 259 S.E. 2d at 903.

We conclude that, notwithstanding defendant's then-existing state of emotional distress, the evidence produced at trial was insufficient to show legal provocation.

III

[5] Defendant's final exceptions are to the trial court's failure to find certain statutory mitigating factors, to wit: (1) the offense was committed under compulsion; (2) there was provocation by the victim and an extenuating relationship between defendant and victim; and (3) the defendant showed good character and reputation. *See* N.C. Gen. Stat. Sec. 15A-1340.4(a)(2)b, i, m (1983).

The defendant has the burden of proving mitigating factors by a preponderance of the evidence, and a trial court must find a factor in mitigation if it is supported by "uncontroverted, substantial and inherently credible" evidence. *State v. Grier*, 70 N.C. App. 40, 48, 318 S.E. 2d 889, 894-95 (1984); *see State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 456 (1983); *see State v. Monroe*, 70 N.C. App. 462, 320 S.E. 2d 14 (1984). On the other hand, should the defendant fail to produce such evidence, the trial judge may reject the proposed factors. *Monroe*.

As an initial matter, we note that the trial court did find as a mitigating factor the defendant's good character and reputation, but determined that, in its discretion, the aggravating factor outweighed the mitigating factor. This was soundly within the court's discretion. *Jones*.

Defendant's evidence of compulsion, provocation or an extenuating relationship apparently is that he was in a state of emotional turmoil, trying to protect his baby from his mother-in-law's boyfriend, who provoked defendant by challenging him to produce the shotgun. We fail to see how defendant can maintain on appeal that this evidence is uncontradicted and inherently credible when, at the sentencing hearing, he testified:

The only thing I can say is it was an accident that happened. Words can never express the remorse that I feel for the pain and trauma that I've caused, but, so help me God, it was an accident. That's the only thing I've got to say.

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Moreover, the testimony of defendant failed to establish that the victim threatened or challenged the defendant within the meaning of the statute. Anderson neither displayed nor threatened to display a weapon. In fact, defendant testified that he told Anderson that defendant had a gun in his car; this suggests that, perhaps, the defendant threatened or challenged the victim. See *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983); see also *State v. Hinant*, 65 N.C. App. 130, 308 S.E. 2d 732 (1983) (trial court did not err in not finding compulsion when credibility questionable due in part to subjective nature of testimony and defendant's interest in mitigation) *cert. denied*, 310 N.C. 310, 312 S.E. 2d 653 (1984); *State v. Michael*, 311 N.C. 214, 316 S.E. 2d 276 (1984) (father/son relationship not necessarily sufficient to prove extenuating relationship, even when father had argued with and had hit son the night before the crime); *State v. Puckett*, 66 N.C. App. 600, 312 S.E. 2d 207 (1984) (evidence that defendant was upset over recent breakup with girlfriend was insufficient; Fair Sentencing Act not intended to provide lighter sentences for those motivated by jealous rage).

For the reasons set forth above, we find

No error.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. TERRY WAYNE NORRIS

No. 8429SC1297

(Filed 29 October 1985)

Infants § 17; Criminal Law § 66.10— juvenile—one-on-one showup without court order—not admissible

In the prosecution of a juvenile for attempted first degree rape in which a one-on-one showup was conducted without a court order before the juvenile was bound over to superior court, G.S. 7A-596, which prohibits such showups, applied despite the fact that defendant had not had formal charges filed against him because that statute, unlike the statute which governs non-testimonial identification procedures for adults, focuses on taking the juvenile into custody; the statutory factors used to determine exclusion of evidence in criminal cases applied because defendant was tried as an adult, the State has a

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special obligation to protect the rights of juveniles, and the Legislature has directed that other procedural aspects of the juvenile code provisions be analogized to the Criminal Procedures Act once the order is issued for non-testimonial identification; and the evidence should have been excluded because the importance of obtaining a court order before conducting non-testimonial identification procedures for a juvenile is clear, there was no question that no attempt whatsoever was made to procure a court order, the deviation from G.S. 7A-596 was complete, there was at least a willful disregard by officers for the clear duties imposed by the law, exclusion of the showup evidence is necessary to deter future violations, and there was prejudice from the testimony. However, the trial court's findings of fact were based on competent evidence and supported the conclusion that the victim's in-court identification was of an origin independent of her experience at the showup. G.S. 15A-974.

APPEAL by defendant from *Davis (James C.)*, Judge. Judgment entered 23 May 1984 in RUTHERFORD County Superior Court. Heard in the Court of Appeals 17 September 1985.

The State's evidence tended to show the following facts and circumstances. Dorothy Lee was working at J and L Furniture Store in Forest City on 7 July 1983. A black male entered the store and went to the back to look at merchandise. After about five minutes, Ms. Lee went to the back to investigate. In a small showroom there, the male grabbed her throat and threatened her with a pocket knife. He thereafter molested her sexually, but did not achieve penetration. He told her to "forget it," made her get dressed and then told her to give him money from her pocket-book. At this point Ms. Lee ran out the front door, screaming, and the assailant fled. Ms. Lee described her assailant to police as a black male, six feet tall, skinny, hair cut close to his head and no facial hair. She also noted a characteristic of his walk, that he tapped his thumb and fingers against his pocket as he moved. the store was well-lighted. Ms. Lee estimated that the assault took approximately fifteen minutes.

Later that day, Ms. Lee searched through four mug books. She also spent time looking at "about a hundred or so" black males walking in front of the store. She was not able to spot her assailant.

On 2 August 1983, she noticed a black male with physique similar to her assailant walking in front of the store, tapping his pockets. she called the police, who took her driving in the direction the suspect had walked, but they were unable to find him.

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Later that afternoon, the police picked up Ms. Lee to go down to the station and identify the defendant. Defendant was in a room behind a one-way mirror, accompanied only by Lieutenant Davis of the Forest City Police Department, a white male. Ms. Lee identified defendant as her assailant, but requested to be let in the room because she "wanted to be sure." She testified at trial that she identified defendant as her assailant from the beginning, but said she wanted to be sure so that she would be allowed to enter the room, confront the defendant, and "intimidate him like he did me."

Lieutenant Davis testified that defendant had stated his age as sixteen when he was picked up, but that defendant's mother said his age was fifteen. Lieutenant Davis confirmed defendant's age as fifteen the day after Ms. Lee identified the defendant at the one-on-one showup. At no time did Lieutenant Davis attempt to obtain a pre-trial identification order for the showup.

Defendant offered three alibi witnesses who testified that defendant spent the entire day fishing.

On 22 May 1984, defendant was found guilty of attempted first degree rape. He received the presumptive term of six years.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard L. Griffin, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant.

WELLS, Judge.

Defendant argues only one assignment of error, in which he contends that the trial court committed error by denying defendant's motion to suppress and allowing into evidence Ms. Lee's trial testimony as to the one-on-one showup and her in-court identification of defendant; that the showup was conducted in violation of N.C. Gen. Stat. § 7A-596 (1981); and that the trial court failed to make findings of fact or conclusions of law regarding this violation.

Nontestimonial identification procedures shall not be conducted on any juvenile without a court order issued pursuant to this Article unless the juvenile has been transferred to superior court for trial as an adult

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N.C. Gen. Stat. § 7A-596 (1981). This statute applies to "lineups or similar identification procedures requiring the presence of a juvenile." *Id.* The one-on-one showup occurred on 2 August 1983. Defendant was not bound over for trial in superior court until 26 September 1983. There was confusion by the police as to whether this statute applied to defendant because of initial uncertainty about defendant's age, but it was a simple enough matter, as Lieutenant Davis testified, for him to go "downstairs" the next day to confirm that defendant was fifteen years old. Even if defendant had been sixteen, the statute would still apply. Unless the context clearly requires otherwise, for the purposes of the Juvenile Code, G.S. Subchapter XI, the term "juvenile" means "[a]ny person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States." N.C. Gen. Stat. § 7A-517(20) (1981). *See also State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983).

The State contends that G.S. 7A-596 did not apply to this showup because defendant had not had formal charges filed against him. The argument is made by analogy to the statute concerning the court order requirement for non-testimonial identification procedures involving adults, N.C. Gen. Stat. § 15A-271 (1983), a statute which has been held not to apply to in-custody defendants. *See State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977).

This argument is without merit. N.C. Gen. Stat. § 15A-272 (1983), "Time of application," focuses on the *arrest* of the suspect, while N.C. Gen. Stat. § 7A-597 (1981) (Juvenile Code) focuses on taking the juvenile into *custody*, indicating an expanded time period when procedural protection of juveniles is necessary. G.S. 15A-271, the adult statute, is stated in positive, permissive terms: "A nontestimonial identification order . . . may be issued. . . ." The juvenile counterpart, G.S. 7A-596, is stated in negative, absolute terms with no mention of time limit: "Nontestimonial identification procedures shall not be conducted on any juvenile without a court order" It is clear from the undisputed evidence below that the one-on-one showup involving the defendant was conducted in violation of the statute.

The effort to fabricate a comprehensive system to deal with crime by juveniles by the passage of the Juvenile Code in 1979 stemmed from a long-held belief that the State should act as *parens patriae* for youthful offenders. *See In re Vinson*, 298 N.C.

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640, 260 S.E. 2d 591 (1979). In that case Justice Carlton remarked that "[c]ommensurate with this toughened attitude towards youth crime is the court system's responsibility to assure due process proceedings for youthful offenders." *Id.* One of the Code's purposes is to assure fair and equitable procedures and to protect the constitutional rights of juveniles. See N.C. Gen. Stat. § 7A-516(2) (1981). The fact that the showup was conducted on a juvenile does not lessen but should actually increase the burden upon the State to see that the child's rights were protected. See *In re Meyers*, 25 N.C. App. 555, 214 S.E. 2d 268 (1975). There are many provisions of the Code that further illustrate the legislature's concern for careful protection of the juvenile's rights. There are several circumstances when records of nontestimonial identification procedures must be destroyed. N.C. Gen. Stat. § 7A-601 (1981). Also, the legislature provided that any person who willfully violates the provisions requiring a court order for nontestimonial identification procedures shall be guilty of a misdemeanor. N.C. Gen. Stat. § 7A-602 (1981).

We cannot allow the State by analogy to use the laxer procedures for adult defendants to justify easing the stricter standards for juvenile defendants. We conclude that the procedural standards for juveniles must be at least as strict as those for adults, when the legislature has given us no guidance otherwise.

Therefore, by referring to the statutory factors used to determine exclusion of evidence in criminal cases, N.C. Gen. Stat. § 15A-974(2) (1983), we turn to the question of whether the evidence of the showup testified to at trial should have been excluded. Though these factors apply by their terms only to the Criminal Procedure Act, N.C. Gen. Stat. § 15A-101 *et seq.* (1983), we employ them in this instance for three reasons: (1) Terry Wayne Norris was tried as an adult. Had he been an adult and evidence against him had been obtained in violation of one of the Criminal Procedure Act provisions, these factors would apply; (2) Norris was a juvenile. The State as *parens patriae* has an obligation to protect the rights of those under its stewardship. To deny a juvenile the very rights expressly granted to adults would be to provide the juvenile a lower, not higher, level of protection. See *In re Vinson*, *supra*; (3) the legislature has directed that other procedural aspects of the Juvenile Code provisions be analogized to the Criminal Procedure Act provisions once the order is issued

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for nontestimonial identification. *See* N.C. Gen. Stat. § 7A-599 (1981).

In determining whether evidence obtained in violation of G.S. 7A-596 should be excluded, we consider the following factors:

- (a) The importance of the particular interest violated;
- (b) The extent of the deviation from lawful conduct;
- (c) The extent to which the violation was willful;
- (d) The extent to which exclusion will tend to deter future violations of the statute.

Cf. N.C. Gen. Stat. § 15A-974 (1983).

The importance of obtaining the court order before conducting nontestimonial identification procedures has been amply illustrated in this opinion. The legislature's concern is evident in the negative absolute language "shall not" contained in the statute. G.S. 7A-601 on the destruction of these records and G.S. 7A-602 on the criminal nature of a violation of the statute both attest to the importance the legislature attached to this protection. There is a clear legislative intent that only those procedures authorized by the statute will be tolerated. *See In re Vinson, supra*. Had a court order been obtained, it is likely that a one-on-one showup would not have been sanctioned. Although this procedure is not *per se* a violation of defendant's due process, it is not favored and should not be used when other, less suspect alternatives are available. *See State v. Turner*, 305 N.C. 356, 289 S.E. 2d 368 (1982); *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974). Finally, once again, there is the concern of the State in its role as *parens patriae* to protect the rights of its juvenile citizens.

There is no question in this case that no attempt whatsoever was made to procure a court order. Therefore, the deviation from lawful conduct under G.S. 7A-596 was complete.

The willfulness of the violation is a more difficult question. We consider the following circumstances: The Forest City police were apparently unaware that, once a juvenile commits a criminal offense, he is subject to the Juvenile Code until he turns eighteen, except as listed in G.S. 7A-517. *See State v. Fincher, supra*. The enforcers of the law, like everyone else, are presumed to

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know what the law is. See *In re Forestry Foundation*, 296 N.C. 330, 250 S.E. 2d 236 (1979). Even if we assume that the officers in charge of the defendant believed in good faith and justifiable confusion that a court order was never necessary for a sixteen-year-old, there remains the failure of Lieutenant Davis to clear up the ambiguity as to whether defendant was sixteen or fifteen. Lieutenant Davis had reason to believe that defendant was only fifteen, but he made no effort to either obtain a court order for the showup or to perform the simple task of going "downstairs" to confirm the defendant's age. If not a willful violation of the law, this act was a willful disregard for the clear duties imposed by the law.

Lastly, we consider the extent to which exclusion would deter future violations of the law. In order to prevent the complete evisceration of this statute, it is necessary to ensure that the State will not enjoy the benefits of the illegally obtained evidence. Lieutenant Davis was seemingly unconcerned about the possibility of his being charged with the misdemeanor violation, a threat that had no effect in this case. The exclusionary rule has long been used to deter police conduct. It does so because

the enforcement officer knows that if he violates a defendant's . . . rights the evidence he obtains in so doing will not be admissible at trial. If the evidence is not admissible (and the prosecution has nothing else upon which to base its case), the defendant cannot be convicted. In effect, the officer's search or seizure has been a waste of time.

State v. Lombardo, 306 N.C. 594, 295 S.E. 2d 399 (1982). For the foregoing reasons and the need to uphold the sanctity of the law, we hold that the evidence of the one-on-one showup should have been excluded at trial. We are supported in this conclusion by *In re Stedman*, 305 N.C. 92, 286 S.E. 2d 527 (1982). In *Stedman*, the trial judge had suppressed fingerprint (i.e., nontestimonial) evidence obtained from a juvenile without the required court order. Fingerprints taken later pursuant to a valid court order were also suppressed. The Supreme Court ruled that the second set of fingerprints had been obtained by evidence independent of the original tainted fingerprints and was therefore admissible. Implicit in this ruling was the Court's approval of the suppression of the original fingerprint evidence, obtained without a court order.

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We turn now to whether the evidence in question was prejudicial to the defendant. The critical issue for the jury in this case was that of *identity*; therefore, the evidence of the showup went directly to the heart of the case. Ms. Lee's testimony as to the showup was one of six evidentiary presentations to the jury implicating defendant: (1) the assault on 7 July; (2) the sighting in front of the store on 2 August; (3) the identification at the police station on 2 August; (4) defendant's mother's showing Ms. Lee a picture of defendant which Ms. Lee identified as her assailant; (5) Ms. Lee's testimony that defendant walked past the store, laughed and pointed a large stick at her in February 1984 in an apparent effort to intimidate her; and (6) Ms. Lee's in-court identification. The greatest quantity of testimony at trial related to the assault. After that, the showup was the issue upon which most time at trial was spent.

It is only human nature that how well one remembers an incident depends at least partially on one's strength of feeling about that incident. Of course, the narration of the assault itself was highly charged with emotion and must be seen as the likely primary source for decision by the jury. However, testimony of the showup was also very emotional:

A. I wanted to go in and face this man that attac[k]ed me, and I wanted to let him know that I wasn't afraid any more. He had the advantage the first time but not any more.

MR. MITCHELL: OBJECTION, MOVE TO STRIKE.

THE COURT: OVERRULED.

A. And I wanted to look him right in the face when I said he was the man that attacked me, and I did.

. . .

A. Because I wanted to intimidate him like he did me when he was in the store. That's why. And that's why I didn't tell Mr. Davis what I was doing, because I wanted to confront him and make him feel a little bit of what I felt when he was in the store and he had the advantage over me.

Taking all the above factors into consideration, we hold that it was prejudicial error for the court to allow into evidence testimony of the showup. There must be a new trial in which all evidence relating to the one-on-one showup of 2 August 1983 is excluded.

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Though the trial court concluded that the showup "was not so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate the defendant's right to due process," it also felt it necessary to conclude that the in-court identification of the defendant was based solely on her experiences of 7 July 1983. The court's findings of fact concerning independent origin were based on competent evidence in the record and so are conclusive upon this Court. *State v. Tann*, 302 N.C. 89, 273 S.E. 2d 720 (1981). We hold that these findings support the conclusion that, as a matter of law, Ms. Lee's in-court identification was of an origin independent of her experience at the showup.

New trial.

Judges WHICHARD and PHILLIPS concur.

L. T. LIVERMON, JR. AND WIFE, NANCY B. LIVERMON, PETITIONERS v. BETTY GILLIAM BRIDGETT AND HUSBAND, WILLIAM M. BRIDGETT; DAISY GILLIAM ALLEN, DIVORCED; ELIZABETH SAUNDERS GILLIAM, WIDOW; SANDRA GILLIAM, UNMARRIED; YVONNE GILLIAM BEARD AND HUSBAND, ARNOLD WILLIAM BEARD; DEBRA GILLIAM, UNMARRIED; CONNIE GILLIAM JOHNSON AND HUSBAND, _____ JOHNSON; JAMES NORMAN PARKER, UNMARRIED; JAMES F. BRIDGETT AND WIFE, MAMIE HECKSTALL BRIDGETT, ORIGINAL RESPONDENTS, AND DELTHEMA ALLEN RUFFIN (NOW DELTHEMA ALLEN COFIELD) AND WILLIE L. RUFFIN, HER HUSBAND, ADDITIONAL RESPONDENTS

No. 856SC148

(Filed 29 October 1985)

1. Reference § 3.1; Rules of Civil Procedure § 53— compulsory reference in boundary dispute

The trial court did not err in ordering a compulsory reference pursuant to G.S. 1A-1, Rule 53(a)(2)(c) where the pleadings showed a potentially complicated boundary dispute in which one side claimed the boundaries were not as stated in the deeds but were marked by known and visible boundaries on the ground.

2. Rules of Civil Procedure § 50.4— motion for judgment n.o.v.—necessity for motion for directed verdict

A motion for a directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict.

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3. Boundaries § 15.1— sufficient evidence to support verdict

The evidence in a boundary proceeding supported a verdict that the boundaries were as contended by respondents where respondents presented evidence tending to show that respondents' intestate and her husband had occupied, cultivated, and timbered the lands under known and visible boundaries from at least 1936 until her death in 1967 and that her heirs had continued to occupy these lands after her death, that these boundaries were represented by natural monuments of some age, that the fields had been cultivated and the timber cut to these boundaries, and that no demand for rent had been made by or rent paid to adjoining landowners, and where petitioners' evidence consisted primarily of surveys prepared by the male petitioner from deeds, and the boundaries on these surveys were marked with monuments placed there by petitioner.

4. Appeal and Error § 31.1— effect of failure to object to charge at trial

Petitioners are barred from assigning error to the charge where they did not object to any portion of the charge at trial. App. Rule 10(b)(2).

5. Boundaries § 13— exclusion of private maps

The trial court in a boundary proceeding did not err in excluding maps prepared by petitioners of surveys of the lands in question and of adjoining lands where petitioners only moved for general admission of the maps into evidence and did not request admission for the limited purpose of illustration. Even if the private maps should have been admitted for illustrative purposes, exclusion of the maps was not prejudicial since petitioners' witnesses were allowed to illustrate their testimony on the official court map.

6. Boundaries § 10.2; Evidence § 41— surveyor's opinion as to location of boundary

Although it was permissible under G.S. 8C-1, Rule 704 for a surveyor to state his opinion as to the location of a boundary, the trial court did not err in excluding a surveyor's opinion testimony locating the boundaries on private maps and allowing the surveyor to state his opinion only as to the boundaries on the official court map.

7. Evidence § 15— boundary dispute—applicability of Rules of Evidence

The Rules of Evidence applied in the trial of a boundary dispute before a jury in September 1984, after the Rules went into effect, although the matter had been heard before the referee in July 1982 before the Rules went into effect.

8. Boundaries § 10.2— cross-examination of surveyor

A question in a boundary proceeding posed by respondents to petitioners' surveyor that "... if you assume the location of one of the points you could put them on the ground anywhere in Bertie County, couldn't you?" concerned a legitimate area of cross-examination and was not unduly argumentative.

9. Adverse Possession § 24— evidence competent on adverse possession issue

Evidence concerning cultivation of a field on the tract in question, the payment or nonpayment of rent, the cutting of wood from the land, and hunting upon the land was relevant to the issue of adverse possession.

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10. Evidence § 33— assertion of another—when not inadmissible hearsay

An assertion of one other than the presently testifying witness is not inadmissible hearsay when it is not offered for the truth of the matter asserted. G.S. 8C-1, Rules 801(c) and 802.

APPEAL by petitioners from *Lewis, Judge*. Judgment signed out of county out of session by consent 23 September 1984. Heard in the Court of Appeals 19 September 1985.

Petitioners instituted this special proceeding seeking a partition of land owned by petitioners and respondents which they inherited from Daisy J. Gilliam through intestate succession. Respondents answered, asserting a counterclaim in which they alleged that the specific courses and distances given in the deeds had not been precisely marked upon the ground, and that Daisy Gilliam had possessed the land for more than twenty years under known and visible lines and boundaries. They sought a determination of the boundaries of the Daisy J. Gilliam lands pursuant to Chapter 38 of the General Statutes prior to any partitioning. On 9 February 1981, Superior Court Judge George M. Fountain, finding the proceeding involved a complicated question of boundary which might require a personal view of the premises, ordered a compulsory reference pursuant to Rule 53(a)(2)(c) of the Rules of Civil Procedure. After hearing evidence and viewing the premises, the referee rendered a report in which he concluded that the boundaries were as contended by respondents. The parties excepted to the referee's report and renewed their demands for a jury trial. On 3 September 1984, the matter was heard before a judge and jury upon the issues framed by the exceptions to the referee's report and the evidence presented to the referee. The jury found the boundaries to be as contended by respondents. From a judgment entered in accordance with the jury's verdict, petitioners appealed.

Pritchett, Cooke & Burch, by W. L. Cooke, for petitioner appellants.

Gillam and Gillam, by M. B. Gillam; Moore and Moore, by Milton E. Moore; and Taylor and McLean, by Donnie R. Taylor, for respondent appellees.

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JOHNSON, Judge.

Petitioners have brought forward ten assignments of error. We have carefully considered each of them and find them to be without merit.

[1] By their first assignment of error, petitioners contend that the court erred in ordering a compulsory reference. Rule 53(a)(2)(c) of the Rules of Civil Procedure allows a court, when the parties do not consent to a reference, to order a reference on its own motion when the case involves a complicated question of boundary or requires a personal view of the premises. The ordering of a reference is within the sound discretion of the court. *Long v. Honeycutt*, 268 N.C. 33, 149 S.E. 2d 579 (1966). Here, the pleadings showed a potentially complicated boundary dispute in which one side claimed the boundaries were not as stated in the deeds but were marked by known and visible boundaries on the ground. A view of the premises would, therefore, be helpful. We thus find no abuse of discretion by the trial court in ordering the reference.

Petitioners' second assignment of error is that the referee's findings of fact were not supported by evidence. The referee's findings, however, were superseded by the jury's verdict and rendered moot. The court entered judgment in accordance with the jury's verdict.

[2, 3] By their third, fourth and sixth assignments of error, respectively, petitioners contend the court erred in denying their motion to set aside the verdict as being against the greater weight of the evidence, in failing to "set aside the verdict and render judgment for the petitioners for as a matter of law the evidence of respondents was insufficient to support a judgment," and in entering judgment for respondents. No motion for judgment notwithstanding the verdict appears in the record nor is there a motion for directed verdict, a prerequisite for making a motion for judgment notwithstanding the verdict. *Graves v. Walston*, 302 N.C. 332, 275 S.E. 2d 485 (1981). Petitioners' fourth assignment of error is, therefore, dismissed. Petitioners did, however, make a motion to set aside the verdict as being against the greater weight of the evidence. A motion to set aside a verdict as being contrary to the greater weight of the evidence is addressed to the sound discretion of the trial judge, whose ruling is not reviewable absent a showing of an abuse of discretion. *Nyto Leas-*

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ing v. *Southeastern Motels*, 40 N.C. App. 120, 132, 252 S.E. 2d 826, 834 (1979). Respondents presented evidence tending to show that Daisy Gilliam and her husband had occupied, cultivated, and timbered the lands under known and visible boundaries from at least 1936 until her death in 1967 and that her heirs had continued to occupy these lands after her death; that these boundaries were represented by natural monuments of some age; and that the fields had been cultivated, and the timber cut, to these boundaries and that no demand for rent had been made by, or rent paid to, adjoining landowners. On the other hand, petitioners' evidence consisted primarily of surveys prepared by petitioner L. T. Livermon, a surveyor, from deeds. The boundaries on these surveys were marked with man-made monuments placed by petitioner. We therefore find no abuse of discretion. We consequently overrule petitioners' third and sixth assignments of error.

[4] By their fifth assignment of error, petitioners except to a portion of the court's charge. Petitioners, however, did not object to any portion of the court's charge at trial. Consequently, they are barred from assigning error to the charge. Rule 10(b)(2) Rules of Appellate Procedure; *Durham v. Quincy Mut. Fire Ins. Co.*, 311 N.C. 361, 317 S.E. 2d 372 (1984). This assignment of error is dismissed.

[5] By their seventh assignment of error, petitioners contend the court erred in excluding maps they prepared of surveys of the lands in question and of adjoining landowners. The law is well settled that private maps are inadmissible as substantive evidence, but may be used for illustrative purposes if a witness testifies to their accuracy from first hand knowledge. 1 Brandis, *North Carolina Evidence* sec. 153 (2d Rev. Ed. 1982); *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). Petitioners only moved for their general admission into evidence and did not request for their admission for the limited purpose of illustration. Under these circumstances, we cannot say the exclusion of the maps was error. See *Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951); *State v. Graham*, 35 N.C. App. 700, 242 S.E. 2d 512 (1978).

[6] Even if the private maps should have been admitted for illustrative purposes, the error was not prejudicial, as petitioners' witnesses were freely allowed to illustrate their testimony on the official court map. For the same reason, we overrule petitioners'

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eighth assignment of error in which they contend the court erred in excluding petitioner L. T. Livermon's opinion testimony as to the location of the boundaries of the lands in question. Before the Rules of Evidence were enacted the rule had long been that a surveyor could not state his opinion as to the location of a boundary. See e.g., *Combs v. Woodie*, 53 N.C. App. 789, 281 S.E. 2d 705 (1981). The rationale for the rule was that the expert was invading the province of the jury as fact finder. Under Rule 704 of the Rules of Evidence, however, an expert may express an opinion on an ultimate issue of fact to be decided by the jury. G.S. 8C-1, Rule 704 (Cum. Supp. 1981). The Rules of Evidence were made applicable to actions commenced after 1 July 1984 and to actions then pending unless application of the Rules would not be feasible or would work an injustice. 1983 Sess. Laws c. 701 s. 3.

[7] In the present case, the matter was heard before the referee in July 1982 and before a jury in September 1984, after the Rules went into effect. The Rules therefore apply. Applying the Rules would not be unfeasible or work an injustice because the trial court, in presenting the transcript of evidence before the referee, ruled upon objections to the evidence *de novo*. All of the evidence and testimony presented to the referee, whether competent or incompetent, was included in the transcript.

We have reviewed each of the numerous exceptions listed under this assignment of error and find that the court only excluded opinion testimony locating the boundaries on private maps. The court allowed petitioner to state his opinion as to the boundaries on the official court map. This assignment of error is overruled.

Petitioners also attempt to argue under their eighth assignment of error that the court improperly excluded evidence. No exception to these matters appears in the record on appeal; therefore, these matters cannot be considered. Rule 10(a), Rules of Appellate Procedure.

[8] By their ninth assignment of error, petitioners contend the court erred in admitting incompetent and irrelevant evidence. They first submit that the court improperly overruled their objection to the following question posed by respondents to a surveyor called by petitioners: "Now, if you assume the location of one of the points you could put them on the ground anywhere in Bertie

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County, couldn't you?" Petitioners argue the question was argumentative. It is well settled that the trial judge has wide discretion in controlling the scope of cross-examination and may limit cross-examination which is unduly repetitive and argumentative. 1 Brandis, North Carolina Evidence sec. 35 (2d Rev. Ed. 1982); *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). Here, the witness had testified on direct examination that he had platted the courses and distances on the deed. He later testified on cross-examination that he did not have personal knowledge of the location of the monuments and points called for in the deeds. Respondents' question soon followed this acknowledgment. The question concerned a legitimate area of cross-examination and was not unduly repetitive or argumentative. We hold the court did not abuse its discretion in overruling the objection.

[9] Petitioners also contend the court erred in admitting evidence by respondents as to the cultivation of a field on the tract, the payment or nonpayment of rents, the cutting of wood from the land, and hunting upon the land. They contend the evidence was irrelevant. This evidence, however, was clearly relevant to the issue of adverse possession. This argument is clearly without merit.

[10] By their tenth and final assignment of error, petitioners contend that the court erred in overruling their objections to the following questions asked to respondent William Bridgett regarding his cultivation of a field in the lands in dispute:

Q. Have you had permission from the heirs to do so?

A. From the heirs.

Mr. Cooke: Objection.

Overruled.

Q. Well, how did you happen to continue cultivating it after Daisy Gilliam died?

Mr. Cooke: Objection.

Overruled.

A. Got permission from the heirs. They told me to keep it up and pay the tax on it.

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They contend the evidence was hearsay. An assertion of one other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted. If offered for any other purpose, the assertion is admissible. 1 Brandis, North Carolina Evidence sec. 138 (2d Rev. Ed. 1982); G.S. 8C-1, Rules 801(c) and 802 (Cum. Supp. 1981). Here, the evidence was not offered for the truth of the matter asserted.

By failing to bring forward assignments of error eleven and twelve, petitioners are deemed to have abandoned them. Rule 28(a), Rules of Appellate Procedure.

For the foregoing reasons, we find

No error.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. GERARD DAVIDSON

No. 8527SC373

(Filed 29 October 1985)

1. Kidnapping § 1.2— kidnapping pursuant to robbery—evidence sufficient

There was sufficient evidence of a separate confinement and restraint to satisfy G.S. 14-39 where the perpetrators, including defendant, forced the victims at gunpoint to walk from the front of a store some thirty to thirty-five feet to a dressing room in the rear where they bound them with tape and robbed both them and the store, none of the property was kept in the dressing room, and it was not necessary to move the victims there in order to commit the robbery. Removal of the victims to the dressing room thus was not an inherent and integral part of the robbery.

2. Constitutional Law § 48— sentencing hearing—ineffective assistance of counsel

A defendant convicted of kidnapping, armed robbery, and conspiracy did not have effective assistance of counsel at his sentencing hearing where counsel offered no argument in defendant's favor, made no plea for findings of mitigating factors, failed to argue for reduced punishment on the basis that defendant was not the armed participant, failed to suggest any favorable or mitigating aspects of defendant's background, failed to advocate leniency, implied that defendant had lied to him by noting that information defendant furnished him was inconsistent with the information furnished by the State,

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performed a prosecutorial function by informing the court that defendant had just completed a sentence for armed robbery, and disparaged defendant before the court by berating him for refusing a plea bargain.

APPEAL by defendant from *Friday, Judge*. Judgments entered 17 October 1984 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 18 October 1985.

Defendant was tried on indictments charging him with five counts of kidnapping, three counts of armed robbery and one count of criminal conspiracy. The State's evidence tended to show, in pertinent part, that:

On the afternoon of 3 August 1984 defendant and two accomplices entered the Clothesline clothing store in Kings Mountain while a fourth accomplice waited in a car outside. The owner of the store was present, as were an employee and one customer. All three were forced at gunpoint to go from the front of the store to a dressing room in the rear some thirty to thirty-five feet away. One of defendant's accomplices brandished a gun. The victims' heads, arms and legs were taped, and their money and jewelry were taken. Another customer who entered the store with her child also was led at gunpoint to the dressing room and bound. Defendant and his accomplices took money from the cash register and merchandise from the tables and then departed.

The jury returned verdicts of guilty of four counts of kidnapping, three counts of armed robbery, and one count of conspiracy. Defendant appeals from judgments of imprisonment for one year on the conspiracy charge and forty years on the kidnapping and armed robbery charges.

Attorney General Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends there was insufficient evidence of separate confinement and restraint to satisfy N.C. Gen. Stat. 14-39, the kidnapping statute, and that the court thus should have granted his motion to dismiss the kidnapping charges. We disagree.

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N.C. Gen. Stat. 14-39 provides, in pertinent part:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

. . .

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony

A restraint which is an inherent, inevitable element of a felony such as armed robbery will not sustain a separate conviction for kidnapping under N.C. Gen. Stat. 14-39(a). *State v. Irwin*, 304 N.C. 93, 102-03, 282 S.E. 2d 439, 446 (1981). In *Irwin*, during an attempted armed robbery defendant forced a drugstore employee at knifepoint to walk from the front cash register to the back of the store in the general area of the prescription counter and the safe. *Id.* at 103, 282 S.E. 2d at 446. The Court stated:

[The victim's] removal to the back of the store was an inherent and integral part of the attempted armed robbery. To accomplish defendant's objective of obtaining drugs it was necessary that [the victim] go to the back of the store to the prescription counter and open the safe. Defendant was indicted for the attempted armed robbery of [the victim]. [Her] removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense.

Id. The Court reasoned that "[t]o permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *Id.*

Where removal is separate and apart from the commission of another felony, however, N.C. Gen. Stat. 14-39(a) allows conviction and punishment for both crimes. In *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983), the defendants abducted a woman from a shopping center parking lot and forced her into nearby woods where one of the defendants raped her. The Court stated:

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Removal of [the victim] from her automobile to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape. Rather, it was a separate course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime. To this extent, the action of removal was taken for the purpose of facilitating the felony of first-degree rape. Thus, defendant's conduct fell within the purview of G.S. 14-39 and the evidence was sufficient to sustain a conviction of kidnapping under that section.

Id. at 239-40, 302 S.E. 2d at 181.

Here the perpetrators, including defendant, forced the victims at gunpoint to walk from the front of the store some thirty to thirty-five feet to a dressing room in the rear where they bound them with tape and robbed both them and the store. Since none of the property was kept in the dressing room, it was not necessary to move the victims there in order to commit the robbery. Removal of the victims to the dressing room thus was not an inherent and integral part of the robbery. Rather, as in *Newman*, it was a separate course of conduct designed to remove the victims from the view of passersby who might have hindered the commission of the crime. The evidence thus was sufficient under N.C. Gen. Stat. 14-39 to sustain the kidnapping convictions, and the court properly denied defendant's motion to dismiss the kidnapping charges.

As a part of his argument that the court should have allowed the motion to dismiss the kidnapping charges, defendant contends that the court instructed the jury improperly regarding the kidnapping offenses. There was, however, no objection to the instructions at trial as required by N.C.R. App. P. 10(b)(2). Further, the record contains neither an exception to the instructions nor an assignment of error supporting this argument. Review on appeal is confined to a consideration of exceptions in the record which are made the basis of assignments of error. N.C.R. App. P. 10(a). We thus decline to consider this argument.

[2] Defendant contends he is entitled to a new sentencing hearing because he was denied effective assistance of counsel at his initial hearing. We are constrained to agree.

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To prevail in this argument defendant must show that his counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E. 2d 241, 248 (1985), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). He must satisfy the following two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error[s] were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

Braswell at 562, 324 S.E. 2d at 248, quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674, 693 (1984). "[E]ven an unreasonable error . . . does not warrant reversal . . . unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E. 2d at 248.

In *Strickland* the United States Supreme Court expressly did "not consider the role of counsel in an ordinary [i.e., non-capital] sentencing." *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064, 80 L.Ed. 2d at 693. That Court previously had stated generally, however, albeit in a capital case, that "sentencing is a critical stage of the criminal proceeding at which [a defendant] is entitled to the effective assistance of counsel." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed. 2d 393, 402 (1977). Other federal courts have stated, in non-capital cases, that the right to be represented by counsel and the related right to effective assistance of counsel "are fully applicable at a sentencing hearing, which has been called a 'critical stage' of the criminal proceeding." *E.g., Golden v. Newsome*, 755 F. 2d 1478, 1482 (11th Cir. 1985). This Court has applied the *Strickland* "rule of reasonableness based on the totality of the circumstances" to the sentencing stage of a criminal proceeding. *State v. Crain*, 73 N.C. App. 269, 272-73, 326 S.E. 2d 120, 123 (1985). Clearly sentencing is a critical stage of a criminal proceeding to which the right to effective assistance of counsel applies.

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Here the totality of the representation by defense counsel at the sentencing hearing (not present counsel) consisted of the following statement to the court:

Your Honor, every now and then you get appointed in a case where you have very little to say and this is one of them. I have talked to [the defendant] in the jail on three or four occasions. I talked to him, as you know, in the lock up before the trial began. The information that he has furnished me is not consistent with other information available to the State and information furnished me by [the prosecuting attorney] with regard to the man's criminal record. He has just completed doing a ten year sentence, he tells me, for armed robbery and he did not make me aware of that until after [the prosecuting attorney] had furnished me certain materials that he had available to him.

As you very well know, I begged and pleaded with him to take a negotiated plea. He was not willing to do that. I informed this Court before the trial began and the record reflects that I did not think that he had any available, reasonable defense under the law of this state; consequently, I had very little to say.

And, unless he would care to make a statement, I've said all I care to.

This statement was altogether lacking in positive advocacy. Counsel offered no argument in defendant's favor, made no plea for findings of mitigating factors, failed to argue for reduced punishment on the basis that defendant was not the armed participant, failed to suggest any favorable or mitigating aspects of defendant's background, and failed even to advocate leniency. More significant, the representation consisted almost exclusively of commentary entirely negative to defendant. Counsel noted that information defendant furnished him was inconsistent with information furnished by the State, thereby implying that defendant had lied to him. Counsel informed the court that defendant had just completed a sentence for armed robbery, thereby performing a prosecutorial function. Counsel berated defendant for refusing a plea bargain, thereby disparaging him before the court.

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Such representation falls "far short of the requirement that reasonably adequate assistance in fact be rendered." *Blake v. Kemp*, 758 F. 2d 523, 533 (11th Cir. 1985) (quoting the District Court opinion which the appellate court affirmed). It is "so deficient as to amount in every respect to no representation at all." *Id.* It "probably caused [the] client more harm than good." *King v. Strickland*, 748 F. 2d 1462, 1464 (11th Cir. 1984), *cert. denied*, --- U.S. ---, 105 S.Ct. 2020, 85 L.Ed. 2d 301 (1985).

"[Z]ealous advocacy is as necessary at sentencing as at trial. . . . [T]he posture of the defense attorney at sentencing should fundamentally be that of an advocate. . . . [T]he defendant . . . deserve[s] . . . the most effective statement possible . . . in light of the available dispositional opportunities." 3 American Bar Association Standards for Criminal Justice at 18-438, 439 (2d ed., 1982 Supp.). A declaration which fails altogether to articulate the positive, stresses counsel's status as an appointed representative, and presents defendant in an entirely negative light, cannot constitute either the effective statement suggested by these standards or the effective representation required by the Sixth Amendment. If resourceful preparation reveals nothing positive to be said for a criminal defendant, at the very least effective representation demands that counsel refrain from making negative declamations.

It is inconceivable that retained counsel, in the presence of a paying client or others funding the representation, would make a sentencing statement like the one made here. The criteria for effective representation are in no way diminished by defendant's status as an indigent.

We hold that defendant has satisfied both the performance and the prejudice prongs of the *Washington-Braswell* standard. Counsel's "attempt to separate himself from his client in [the sentencing] argument represented a breach of his duty of loyalty to his client stressed by the [U.S.] Supreme Court." *King*, 748 F. 2d at 1464, citing *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065, 80 L.Ed. 2d at 694. "The Sixth Amendment recognizes the right to counsel because effective counsel plays a role that is critical to the ability of the adversarial system to produce just results." *Golden*, 755 F. 2d at 1484. The total breakdown in the adversary process at the sentencing stage of defendant's trial has rendered

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the justice of his sentence unreliable. *See id.* There is a considerable probability that the sentencing argument, which contained no positive advocacy and much negative, had an adverse impact on the sentencing authority. The probability that effective counsel could have convinced the court to issue a lesser sentence is sufficient to undermine our confidence in the outcome. *See King*, 748 F. 2d at 1464-65. Accordingly, the sentences are vacated, and the case is remanded for resentencing.

No error in the trial; sentences vacated; remanded for resentencing.

Judges EAGLES and COZORT concur.

EVELYN D. BOWLES v. CTS OF ASHEVILLE, INC. AND AMERICAN
MOTORISTS INS. CO.

No. 8510IC84

(Filed 29 October 1985)

Master and Servant §§ 55.3, 65.2— workers' compensation—pain in back—no compensable injury by accident

Plaintiff did not suffer a compensable injury by accident within the meaning of G.S. 97-2(6) prior to its 1983 amendment where pain in plaintiff's back had been building up over a period of months and pain she felt on 6 April 1983 was the same type of pain but was worse than before, and where plaintiff was working on 6 April under conditions identical to those under which she had worked throughout her employment as a quality control inspector.

APPEAL by defendants from the opinion and award of the Industrial Commission entered 20 August 1984. Heard in the Court of Appeals 17 September 1985.

Randolph G. Romeo for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Martha W. Surles, for defendant appellants.

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BECTION, Judge.

In this workers' compensation case, the defendants appeal from the award of benefits by the Industrial Commission to the plaintiff, Evelyn D. Bowles.

Ms. Evelyn Bowles was employed by defendant CTS of Asheville, Inc. (CTS) as a parts inspector in the quality control department for several years. Metal or tin pans containing parts for her inspection routinely were brought to her work station. The pans were stacked three to five pans high on a pallet. Since October 1982, Ms. Bowles had to pull the pans with a hook or by hand across a rough area in the floor where a machine had been. She pulled ten to sixty pans each work day. Each day for three or four years Ms. Bowles had difficulty pulling apart the pans to inspect the parts because the pans were warped and bent and often stuck together. She experienced back pains for four or five months prior to 6 April 1983. She first noticed the pains when she pulled on the pans at work, and the pain gradually got worse. She felt the pain whenever she pulled on the pans.

On 6 April 1983, Ms. Bowles was performing her regular job and had difficulty pulling apart two pans. She asked a co-worker for assistance, as she had done many times before, and together, with the usual effort, they tried to separate the pans. She felt the same type of back pain on this occasion as she had felt before, but it was a lot worse. They were unable to separate the pans, but this was not unusual.

In a recorded statement, considered by the Industrial Commission, Ms. Bowles said there was no particular day when she was injured, but that the pain in her back had been gradually building up for three to four months.

On 16 February 1984, Deputy Commissioner Stephens filed an opinion and award that denied Ms. Bowles' claim, concluding that "[a]ny injury which plaintiff sustained to her back on 6 April 1983 did not arise by accident." On 20 August 1984, the Commission filed an opinion and award that reversed the Deputy Commissioner's decision and awarded Ms. Bowles compensation because the Commission concluded as a matter of law that "Plaintiff sustained an injury by accident arising out of and in the course of her employment on 6 April 1983 as the result of an in-

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interruption of her normal work routine" Chairman Stephenson filed a dissent. Because we believe there is no evidence to support the finding of the Commission that Ms. Bowles' injury arose by accident as that term is defined in N.C. Gen. Stat. Sec. 97-52 (1979), we reverse the Commission.

The sole issue on appeal is whether the evidence of record in this case supports the conclusion that Ms. Bowles' back pain was the result of an accident and is therefore compensable under this State's Workers' Compensation Act. An injury occurring in the course of employment is compensable under the Act only if it is caused by accident. The term "accident" is defined by the Supreme Court as: "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Harding v. Thomas and Howard Co.*, 256 N.C. 427, 428, 124 S.E. 2d 109, 110-11 (1962) (citations omitted).

In *Harding*, the Industrial Commission had found that the plaintiff had been injured by accident in the course of employment. The employee had worked for more than six years as a truck driver and regularly assisted in loading and unloading the truck at a warehouse and along his delivery routes. "The injury occurred as he picked up [a twelve-pound] case of coffee, just as he had been doing for six and one-half years. He went through the same motions, and as far as he knew did identically what he had been doing on all prior occasions. The truck was loaded and unloaded in the same way, and carried similar articles." *Id.* at 428, 124 S.E. 2d at 110. The Court reversed the Commission because this evidence was insufficient to sustain a finding of injury by accident. *Id.* at 429-30, 124 S.E. 2d at 111.

To sustain an award of compensation in ruptured or slipped disc cases the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. . . . Accident and injury are considered separate. Ordinarily, the accident must precede the injury. . . . Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. . . .

Complaint is sometimes made that this Court has placed too much emphasis on "accident" and too little on "injury."

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Our interpretation of the Workmen's Compensation Act is well known to the legislative department of the State. If and when a change is desirable, the General Assembly has ample power to make it.

Id. at 429, 124 S.E. 2d at 111 (citations omitted).

The cases upholding compensation awards involve some activity by the employee which is unusual for that employee. For example, awards have been upheld to compensate for injuries sustained in stripping concrete floors in a manner that was not part of the employee's regular work, *Faires v. McDevitt and Street Co.*, 251 N.C. 194, 110 S.E. 2d 898 (1959), in lifting large scrap lumber when the employee usually handled only finished lumber, *Key v. Wagner Woodcraft*, 33 N.C. App. 310, 235 S.E. 2d 254 (1977), and in pulling "extra hard" on a roll of cloth when the employee strained more than usual to accomplish her task, *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E. 2d 360 (1980). In accord is *Adams v. Burlington Industries, Inc.*, 61 N.C. App. 258, 300 S.E. 2d 455 (1983), in which this Court held that an injury is caused by "accident" when it is the result of the interruption of the employee's straight-posture work routine by the introduction of "turning and twisting movements" required by a new task. *Id.* at 262, 264 S.E. 2d at 457.

It is equally clear from the cases that once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an "injury by accident" under the Workers' Compensation Act. See, e.g., *Hensley v. Farmers Federation Cooperative*, 246 N.C. 274, 98 S.E. 2d 289 (1957) (twisting movement became part of job); *Trudell v. Seven Lakes Heating & Air Conditioning Co.*, 55 N.C. App. 89, 284 S.E. 2d 538 (1981) (low crawl space became part of work routine after one or two weeks); *King v. Exxon Co.*, 46 N.C. App. 750, 266 S.E. 2d 37, *disc. rev. denied*, 301 N.C. 92, 273 S.E. 2d 299 (1980) (straining to lift heavy computers became part of routine); *Smith v. Burlington Industries, Inc.*, 35 N.C. App. 105, 239 S.E. 2d 845 (1978) (working in cramped and awkward position became part of job); *Southards v. Byrd Motor Lines, Inc.*, 11 N.C. App. 583, 181 S.E. 2d 811 (1971) (lifting heavy objects was a regular task).

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It is insufficient as a matter of law to show only that in the past a regular activity caused no pain and that the same activity now causes pain. See *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E. 2d 763 (1982); *Russell v. Pharr Yarns, Inc.*, 18 N.C. App. 249, 196 S.E. 2d 571 (1973). There must be a specific fortuitous event, rather than a gradual build-up of pain, in order to show injury by accident. *Trudell; O'Mary v. Land Clearing Corp.*, 261 N.C. 508, 135 S.E. 2d 193 (1964).

In addition to the case law defining "accident" under the Workers' Compensation Act, it is important to keep in mind the specific legislative limitation placed on the interpretation of this term:

The word "accident," as used in the Workers' Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this Article. . . .

N.C. Gen. Stat. Sec. 97-52 (1979). The purpose of this Section and Section 97-53 was to compensate employees for occupational disease as defined in the Act. *Henry v. A. C. Lawrence Leather Co.*, 234 N.C. 126, 66 S.E. 2d 693 (1951). The limitation on the meaning of "accident" simply prevents claims for maladies that are neither occupational in nature nor arise from an event definite in time and place. See *id.* This Section precludes claims for conditions that develop gradually but do not fall into the category of occupational disease. *Murphy v. American Enka Corp.*, 213 N.C. 218, 195 S.E. 2d 536 (1938).

The evidence of record in the case at bar is insufficient to support the Industrial Commission's conclusion that Ms. Bowles' injury was caused by an accident. Nothing in the record indicates that the injury to her back resulted from a fortuitous event, an interruption of her work routine or an unusual task. Ms. Bowles' uncontradicted testimony was that she frequently was required in her regular job to separate pans that were stuck together. She often had to enlist the aid of her co-workers, and sometimes they

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would be unable to accomplish this task. It may be true that Ms. Bowles has an unusual job, or that her job is unusually strenuous. Nevertheless, the law is clear that the specific event causing the injury must be unusual in the context of the employee's regular work routine.

There is also no evidence that the injury was caused by a discrete incident. Ms. Bowles stated that she felt the pain before 6 April 1983, that the pain just kept getting worse, and that the pain she felt on 6 April was the same type of pain, just a lot worse than before. According to the findings of the Commission, on 6 April Ms. Bowles was working under conditions identical to those under which she had worked throughout her employment as a quality control inspector. She had the usual help of her co-worker to separate the pans, and she had handled pans stuck just as tightly in the past. *Compare Moore v. Engineering & Sales Co.*, 214 N.C. 424, 429-30, 199 S.E. 605, 608 (1938) (the evidence disclosed that the employee had lifted the pipes in the ordinary manner, but "two things occurred which, taken together, were out of the ordinary, and are sufficient . . . to bring into the transaction the element of unusualness and unexpectedness from which accident might be inferred": (1) the employee did not have the usual help, and (2) the employee never lifted pipes of this extreme weight).

We note that the injury by accident doctrine in this State has come under considerable criticism. *See* Comment, Injury by Accident in Workers' Compensation: Alternatives to an Outmoded Doctrine, 59 N.C. L. Rev. 175 (1980). The rule originated in England and permitted recovery for injuries such as muscle pulls and blood vessel ruptures. The "by accident" requirement was added to exclude self-inflicted injuries. *Id.* at 178-79. In this State, however, the rule was changed back and forth between allowing recovery whenever a worker showed an untoward result and requiring a worker to prove an untoward and unexpected, external cause. *Compare Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591 (1930) and *Smith v. Cabarrus Creamery Co.*, 217 N.C. 468, 8 S.E. 2d 231 (1940) with *Slade v. Willis Hosiery Mills*, 209 N.C. 823, 184 S.E. 844 (1936); *Edwards v. Piedmont Publishing Co.*, 277 N.C. 184, 41 S.E. 2d 592 (1947) and *Hensley*. Since 1983, when N.C. Gen. Stat. Sec. 97-2(6) was amended, injury by accident need not be proven, at least not in back injury cases. Had this

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case arisen after the effective date of the amendment, the outcome might have been different. *See Bradley v. Sportswear*, 77 N.C. App. 450, --- S.E. 2d --- (1985).

For the reasons stated above, we hold that the plaintiff was not injured by accident as defined by the Workers' Compensation Act at the time this action arose, and the Industrial Commission erroneously reversed the Deputy Commissioner's decision. Therefore, we

Reverse and remand to the Industrial Commission for proceedings consistent with this opinion.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. RONNIE L. MOORE

No. 8523SC391

(Filed 29 October 1985)

1. Criminal Law § 122.2— armed robbery and kidnapping—additional instructions upon failure to reach verdict—no error

The trial court did not err in a prosecution for armed robbery and second degree kidnapping in its instructions to the jury on further deliberations where the jury deliberated for one hour and fifteen minutes, then returned to the courtroom with one juror stating that she could not in good conscience come to the same conclusion as the rest of the jury. The judge's charge was a restatement of the instructions provided by G.S. 15A-1235, the judge merely instructed the dissenting juror to consider the evidence with the other jurors and reexamine her own views, and he twice cautioned the jury not to compromise their convictions or do violence to their conscience.

2. Kidnapping § 1.2— kidnapping pursuant to robbery—evidence sufficient

The evidence was sufficient to support a verdict that defendant was guilty of second degree kidnapping where defendant and an accomplice went to a parking lot near a grocery store, found Mickey Miller and Susan Gambill in a parked automobile, pointed guns at Miller and Gambill and ordered them out of the automobile, forced them to walk to a wooded area behind the store, defendant threatened to kill Miller if he was not quiet, defendant and his accomplice left Miller behind the store and instructed him that Gambill would not be harmed if he remained there, defendant and his accomplice took Gambill into the store, defendant held a gun to another victim's head, his accomplice took money, credit cards, and a pistol from his possession, and Miller

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remained behind the store for two or three minutes and left. Defendant restricted Miller in his freedom of motion by threatening him with a gun and thus restrained him within the meaning of G.S. 14-39; defendant removed Miller by forcing him to leave his automobile and move to a different location behind the store; and defendant kidnapped Miller for the purpose of facilitating the armed robbery in that defendant was attempting to prevent Miller from contacting the police.

APPEAL by defendant from *Rousseau, Judge*. Judgments entered 7 November 1984 in Superior Court, WILKES County. Heard in the Court of Appeals 21 October 1985.

Defendant was charged in proper bills of indictment with the armed robbery of Benny Hayes, the second degree kidnapping of Mickey Miller, and the second degree kidnapping of Susan Gambill. Defendant was found guilty as charged in the three cases. From judgments imposing a prison sentence of thirty years for armed robbery, nine years for the second degree kidnapping of Mickey Miller, and nine years for the second degree kidnapping of Susan Gambill, sentences to run consecutively, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Victor H. E. Morgan, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant's third assignment of error is set out in the record as "[t]he court erred by refusing to declare a mistrial after one juror indicated her desire to be dismissed because she could not in good conscience agree with the other jurors, since he thereby coerced a verdict." The record discloses that after the jury deliberated for one hour and fifteen minutes, they returned to the courtroom. One juror stated that she could not, in good conscience, come to the same conclusion as the rest of the jury. The judge stated:

Well, a jury consists of twelve people, and we cannot have a verdict of less than twelve people. It's a jury's function to sit together and listen to the evidence; to go back and deliberate their verdict, talk about it among yourselves.

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Oftentimes we, as individuals, hear things and we think one thing is the right way on it, and then after listening to our other fellow jurors sometimes we realize that our position might not be correct, the one we took right to begin with. That's part of the function of the jury—it is the function of the jury to sit together and sit down and reason these things together and come to a true and just verdict if you possibly can. Now, you have only been deliberating about 45 minutes yesterday and something less than 30 minutes this morning, and, ma'am, I'll ask you to go back and sit with the other jurors longer. Now, I do not ask anyone to compromise their convictions or do violence to their conscience. All I ask is that you sit together and talk about it among yourselves, and see if you can arrive at a verdict. Now, oftentimes it is impossible for a jury to arrive at a verdict, but I don't think you've been deliberating quite long enough, so, anyway, I am going to let you deliberate a little longer. But again, I caution each of you, and you, Ms. Cain, I do not ask anyone to compromise their convictions or do violence to their conscience. All I ask is that you sit together, discuss about it, and let each one have their say about it, hear what they have to say, talk about it, and see if you can't arrive at a verdict.

He then sent the jury back to deliberate longer. The jury later returned, finding defendant guilty as charged in the three cases. The jury was polled and each juror assented to the verdicts.

When a jury appears unable to agree, a trial judge may require the jury to continue deliberations, but has no right to coerce a verdict. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). A charge which, when taken as a whole, a juror might reasonably construe as requiring him to surrender his convictions to the view of the majority is erroneous. *Id.* The judge may give or repeat the following instructions to the jury in these circumstances:

(a) . . . that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) . . . that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

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(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

G.S. 15A-1235. The instructions provided by G.S. 15A-1235 are guidelines for the trial judge and need not be given verbatim. *State v. Jeffries*, 57 N.C. App. 416, 291 S.E. 2d 859, *disc. rev. denied*, 306 N.C. 561, 294 S.E. 2d 374 (1982). In giving such instructions, the trial judge must be allowed to exercise his sound judgment to deal with the myriad different circumstances he encounters at trial. *Id.*

In the present case, the judge's charge was a restatement of the instructions provided by G.S. 15A-1235. A juror could not reasonably conclude from this charge that it was necessary that he compromise his convictions. Judge Rousseau merely instructed the dissenting juror to consider the evidence with the other jurors and reexamine her own views. He twice cautioned the jury not "to compromise their convictions or do violence to their conscience." This language negates any coercion that may exist in the charge. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948, 93 S.Ct. 293, 34 L.Ed. 2d 218 (1972). Under these circumstances, we believe the judge properly exercised his discretion in sending the jury back to deliberate and refusing to declare a mistrial.

[2] Defendant also contends that the evidence was not sufficient to support the verdict that defendant was guilty of second degree kidnapping of Mickey Miller. The evidence offered at trial tends to show that defendant and his accomplice went to a parking lot near Benny Hayes' grocery store, where they found Mickey Miller and Susan Gambill in a parked automobile. Defendant and his accomplice pointed guns at Miller and Gambill and ordered them out of the automobile, and forced them to walk to a wooded area

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behind the store. There, defendant threatened to kill Miller if he was not quiet. After a few minutes, defendant and his accomplice left Miller behind the store, instructing him that Gambill would not be harmed if he remained there. Whereupon, defendant and his accomplice, still armed, took Gambill into the store. In the store, defendant held a gun to Benny Hayes' head and, with his accomplice, took \$1,560, a billfold containing credit cards, and a pistol from his possession. Miller remained behind the store for two or three minutes and then left.

Defendant argues that merely having Mickey Miller get out of his car and walk behind the store near where his car was parked did not amount to second degree kidnapping because the evidence of restraint or removal from one place to another was insufficient and that there was no evidence that the kidnapping actually facilitated the commission of the armed robbery.

G.S. 14-39, in pertinent part, provides:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of: . . .

(2) Facilitating the commission of any felony. . . .

In *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978), the Supreme Court defined "restrain" and "remove" for the purposes of this statute. The term "restrain" connotes restriction by force, threat or fraud with or without confinement. *Id.* Restraint does not have to last for an appreciable period of time and removal does not require movement for a substantial distance. *Id.* In enacting G.S. 14-39 the Legislature clearly intended to "make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed." *Id.* at 522, 243 S.E. 2d at 351.

Restraint or removal of the victim for any of the purposes specified in the statute is sufficient to constitute kidnapping. Thus, no asportation is required where there is the requisite restraint. *Fulcher*, 294 N.C. 503. In *State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980), where there was evidence that the victim was prevented from walking to a neighbor's house and forced to

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enter her own home, the court held that the State had shown both restraint and removal.

Restraint or removal of a victim is not kidnapping unless it is for one of the purposes enumerated in the statute. *Fulcher*, 294 N.C. 503. One of the purposes is the facilitation of the commission of a felony. Intent, for the purpose of this statute, may be inferred from the circumstances surrounding the event and must be determined by the jury. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). Thus, in *White*, where the evidence showed that the defendant was prepared to commit a sexual assault on his victim when he forced him into an alley and did in fact assault him, the court held that the jury could infer that the defendant had taken his victim there for that purpose. *Id.*

In this case, the evidence was clearly sufficient to permit the jury to find all of the elements of kidnapping present. The evidence that defendant restrained the victim and removed him from one place to another was sufficient to support the verdict. Defendant restricted Miller in his freedom of motion by threatening him with a gun, and thus restrained him within the meaning of the statute. He also removed Miller by forcing him to leave his automobile and move to a different location behind the store. The distance of the removal and the duration of the restraint are immaterial in this case.

The evidence also adequately shows that defendant kidnapped Miller for the purpose of facilitating the armed robbery of Benny Hayes. By forcing Miller to go behind the store and warning him, when he and his accomplice left with Susan Gambill, that she would not be harmed if he remained there, the jury could infer that defendant was attempting to prevent Miller from contacting the police and thereby facilitating the armed robbery. It is not necessary under this statute to show that the kidnapping accomplished its purpose, and thus the fact that Miller left to report the crime is immaterial. Finally, the argument of defendant that the felony which was facilitated by the kidnapping must also be committed against the victim of the kidnapping is without merit, because the statute clearly requires only that the kidnapping facilitate the commission of any felony.

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No error.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. KENNETH EARL BELTON

No. 8512SC170

(Filed 29 October 1985)

1. Criminal Law § 34.8— robbery and assault—testimony regarding prior offense—admissible to show identity and common scheme or plan

In a prosecution for robbery with a firearm and assault with a deadly weapon inflicting serious injury in which defendant was accused of being one of two men to rob and shoot with a shotgun a man who had accepted a ride with them, the trial court did not err by admitting testimony that defendant and an accomplice on a prior occasion had used a shotgun to abduct, rob, and take the automobile of the witness, and that when her car was returned it had been washed and waxed, there were seat covers over part of the seats, the carpet had been shampooed, and there were shotgun pellets in the seats. The evidence was admissible to aid in identifying defendant as a perpetrator of the crime and to show a common scheme or plan, and the court carefully instructed the jury that it could only use the evidence to establish identity and a common scheme or plan. G.S. 8C-1, Rule 404(b).

2. Criminal Law § 89.10— cross-examination of witness—prior degrading conduct—admissible

In a prosecution for robbery with a firearm and assault with a deadly weapon inflicting serious injury in which defendant's accomplice testified for defendant, the trial court did not err by permitting the State to cross-examine the accomplice regarding prior statements and whether he had raped a witness for the State who had testified regarding a prior offense involving defendant and the accomplice. G.S. 8C-1, Rules 607, 608.

APPEAL by defendant from *Johnson, E. Lynn, Judge*. Judgment entered 4 October 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 24 September 1985.

Defendant was charged in a proper bill of indictment with robbery with a firearm and assault with a deadly weapon inflicting serious injury. At trial the State offered evidence which tended to show the following facts. On 28 May 1983, James Paul MacNeilly was walking along Bragg Boulevard toward Fort Bragg when two men in a small car stopped and asked him if he wanted

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a ride. MacNeilly accepted the ride from the two men, later identified as the defendant and Eugene Saddler. After MacNeilly entered the vehicle, the driver left Bragg Boulevard and turned onto Sycamore Dairy Road. The passenger then pulled a sawed-off shotgun on the victim and demanded his wallet. The victim attempted to grab the gun and get out of the car. As MacNeilly was leaving the car, Saddler shot him in the leg with the shotgun and forced him back into the car. A short time later MacNeilly was forced to leave the car and walk toward some woods. As he was walking toward the woods one of the robbers took his wallet, pocketknife and a money clip containing sixty dollars. As a result of the wound inflicted by the shotgun, MacNeilly spent a week in a Fayetteville hospital and two months at Walter Reed Hospital undergoing treatment, including several skin grafts. The State also presented extensive circumstantial evidence linking the defendant to the automobile and the sawed-off shotgun.

Defendant offered testimony from a number of witnesses who testified that he was at a party when the robbery occurred. Saddler also testified for the defendant. In his testimony he admitted robbing and shooting MacNeilly, but he claimed that the driver of the vehicle was not defendant but an Alvin Jackson.

Defendant was convicted of both charges. The charges were consolidated for judgment, and defendant was sentenced to forty years imprisonment. From this judgment, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends the trial court erred in denying his motion to limit the testimony of Doris Nunnery regarding a prior offense of the defendant. We disagree.

At trial, after having her proposed testimony reviewed during a motion *in limine*, the State elicited the following pertinent evidence from Doris Nunnery:

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Q. Ms. Nunnery, directing your attention to May 22nd, 1983, did you have occasion to see the defendant, Kenneth Belton, on that day?

A. Yes. I did.

Q. And was that at the Dragon Club out at Fort Bragg?

A. Yes. It was.

Q. And how did you travel to the Dragon Club at Fort Bragg?

A. I drove my car.

Q. Ma'am, I show you what has been marked for identification as State's Exhibit Number Five and ask if you recognize that.

A. Yes. I do.

Q. What is State's Exhibit Five?

A. That is my car.

Q. Was it in the parking lot that you first saw Kenneth Belton?

A. Yes. It was.

Q. And who was he with?

A. Eugene Saddler.

Q. And was anybody with you?

A. Yes. My girlfriend, Rebecca White.

Q. And did you have occasion to see a weapon in the possession of Kenneth Belton at that time?

A. Yes. I did.

Q. Can you describe that weapon, please?

A. Kenneth Belton had a hand pistol—a gun—a handgun.

Q. Did you see a weapon in the possession of Eugene Saddler at that time?

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A. Yes. He had a sawed-off shotgun.

Q. I show you what has been marked for identification as State's Exhibit Number One and ask if you recognize and can identify that.

A. It appears to be the same gun that Eugene Saddler had that night except it doesn't have tape on it. It was wrapped in black tape.

Q. Now, ma'am, at gunpoint, were you forced to go from the Dragon Club to a wooded area somewhere in Cumberland County?

A. Yes. I was.

Q. Now during the course of that trip from the Dragon Club, who was driving your automobile?

A. Kenneth Belton.

Q. Where was Eugene Saddler at that time?

A. He was in the back seat directly behind me.

Q. And upon arriving at the wooded area, was your automobile taken from you?

A. Yes. It was.

Q. Was that also done at gunpoint?

A. Yes. It was.

Q. And was other property taken from you at that time?

A. Yes.

Q. And that included a purse and clothing and that sort of thing?

A. Yes. It was.

Q. Did Eugene Saddler retain the shotgun the entire time you were in his and Kenneth Belton's presence?

A. No. He did not.

Q. Did Belton ever have that shotgun?

A. Yes. He did.

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Ms. Nunnery was also allowed to testify that when her car was returned to her about a week and a half later that it had been washed and waxed, that there were seat covers over a part of the seats, that the carpet had been shampooed and that there were shotgun pellets in the seats. A jury view of the vehicle was conducted following Ms. Nunnery's testimony. At the close of Ms. Nunnery's testimony the court gave the following instructions:

COURT: Ladies and gentlemen of the jury, first let me give you some instructions in respect to the testimony of Ms. Nunnery.

This evidence was received and received solely for the purposes of showing the identity of the person who committed the crimes charged in this case if, in fact, they were committed.

And further the evidence has been received solely for the purpose of determining whether or not there existed in the mind of this defendant a plan, scheme, system or design involving the crime charged in this case. And it's received for those limited purposes only.

Defendant argues that this evidence was irrelevant, had no probative force regarding any element of the armed robbery or the assault charge, and that its admission was severely prejudicial because it tended to show he had a bad character or a propensity to involve himself in armed robberies and other criminal activities.

Rule 404(b) of the North Carolina Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

This is consistent with the North Carolina practice prior to the enactment of the Rules of Evidence. Rule 404, Rules of Evidence, Commentary. *See also State v. Hunt*, 305 N.C. 238, 287 S.E. 2d 818 (1982); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

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The evidence to which defendant objects was admissible to aid in identifying defendant as the perpetrator of the crime. The fact that the car which the defendant stole from Ms. Nunnery was used to later rob Mr. MacNeilly coupled with the fact that the same weapon was used in both offenses is sufficient to establish the relevance of the evidence to show that the same person, namely the defendant, committed both these offenses. The evidence was also admissible to show a common scheme or plan because when a defendant uses a stolen instrumentality to commit a crime, evidence of the instrumentality's theft is admissible to show a plan to commit the subsequent crime. *See, State v. Rich*, 304 N.C. 356, 283 S.E. 2d 512 (1981).

The court carefully instructed the jury that it could only use the evidence to establish identity and a common plan or scheme. The evidence was relevant to show these things, thus, defendant's contentions are without merit.

[2] Defendant also contends the court erred by allowing the State to cross-examine Mr. Saddler regarding whether he had raped Doris Nunnery and about prior statements that he had made at a previous trial. In this question defendant brings forth and attempts to argue two assignments of error based upon twenty-one (21) exceptions. An examination of the record reveals that seventeen of these exceptions are not supported by objections to the question or a motion to strike the answer. In this State, it has long been the rule that an objection to, or a motion to strike, an offer of evidence must be made contemporaneously with the complained of action; and unless such objection was made, the party is held to have waived the right to bring the objection forth on appeal. *See, State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). Therefore, defendant has waived his right to have us consider his contentions with regard to the exceptions not based upon contemporaneous objections or motions to strike. The remaining four exceptions deal with objections to questions regarding Saddler's rape of Ms. Nunnery and to questions regarding his prior testimony. Prior bad acts and prior inconsistent statements are proper subjects for cross-examination. *See Rules 607, 608 of the North Carolina Rules of Evidence*. Thus, we find no merit in defendant's contention.

Defendant had a fair trial, free from prejudicial error.

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No error.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. LILLY LYONS

No. 8510SC349

(Filed 29 October 1985)

**1. Criminal Law § 128.2— improper question on cross-examination of defendant—
mistrial**

The trial court did not abuse its discretion in granting defense counsel's motion for a mistrial in a prosecution for assault on a school teacher when the prosecutor asked defendant a question on cross-examination relating to her state of mind at the time she murdered her husband and defendant asked whether she was being retried for murder, even though defendant stated that she wanted the trial to proceed, where the court had ruled that the jury could consider defendant's prior murder conviction only as it might relate to defendant's credibility, and the court determined that under the circumstances there was a probability that the jury would consider defendant's prior conviction in a manner prejudicial to defendant and thus prevent a fair trial.

**2. Constitutional Law § 49— defendant appearing pro se—failure to give
statutory instructions**

The trial court erred in allowing defendant to proceed *pro se* without giving her the instructions provided in G.S. 15A-1242 notwithstanding the court had a lengthy discussion with defendant regarding the case.

APPEAL by defendant from *Barnette, Judge*. Judgment entered 10 December 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 16 October 1985.

Defendant was charged in a proper warrant with assault on a school teacher when the "school teacher was attempting to discharge a duty of her office," in violation of G.S. 14-33. After a trial by a jury, defendant was found guilty as charged and appealed from a judgment imposing a jail sentence of six months.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Geoffrey C. Mangum, for defendant, appellant.

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HEDRICK, Chief Judge.

[1] By her first assignment of error defendant contends she has been subjected to "double jeopardy" because her first trial ended when the judge declared a "mistrial." The record discloses that during the first trial, the State asked defendant on cross-examination a question regarding her prior conviction of killing her husband. Defendant's counsel made a motion for mistrial which was granted. Defendant, Lilly Lyons, stated that she wanted the trial to proceed. Defendant now argues that the trial judge abused his discretion when, over defendant's objection, he granted the mistrial. We do not agree.

Defendant will hardly be heard to complain about the court's granting her own motion for a mistrial. Assuming, however, that the trial court granted the motion over defendant's objection, there is nothing in this record to indicate that the trial court abused its discretion in ordering a mistrial.

Under G.S. 15A-1063(1) a judge may declare a mistrial, upon a motion of a party or upon his own motion, if "[i]t is impossible for the trial to proceed in conformity with law." This statute allows a judge, over the defendant's objection, to grant a mistrial where he could reasonably conclude that the trial will not be fair and impartial. *State v. Malone*, 65 N.C. App. 782, 310 S.E. 2d 385, *disc. rev. denied and appeal dismissed*, 311 N.C. 405, 319 S.E. 2d 277 (1984); *State v. Cooley*, 47 N.C. App. 376, 268 S.E. 2d 87, *disc. rev. denied and appeal dismissed*, 301 N.C. 96, 273 S.E. 2d 442 (1980).

A plea of former jeopardy will not preclude a subsequent trial of a defendant, where the mistrial was ordered, over defendant's objections, due to "physical necessity or the necessity of doing justice." *State v. Shuler*, 293 N.C. 34, 42-43, 235 S.E. 2d 226, 231 (1977) (citation omitted).

An order of a mistrial on a motion of the court is "addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion." *State v. Malone*, 65 N.C. App. at 785, 310 S.E. 2d at 387 (citations omitted). To ensure that mistrial is declared only for necessity, G.S. 15A-1064 provides: "Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case."

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The purpose of this statute is to protect the constitutional rights of defendants and to facilitate the process of appellate review. *State v. Jones*, 67 N.C. App. 377, 313 S.E. 2d 808 (1984).

In the present case, the trial court made findings of fact that defendant made a motion to suppress questions by the district attorney relating to a prior conviction of defendant for first degree murder and that this motion had been denied to allow the jurors to consider the conviction as it might relate to defendant's credibility. The court also found that during cross-examination the district attorney asked a question relating to defendant's state of mind at the time of the murder of her husband and that defendant asked whether she was being retried for murder. On this basis, the judge's conclusion that there was a probability that the jury would consider the prior conviction in a manner that would be prejudicial to defendant and thus prevent a fair trial was reasonable. The judge's findings of fact are sufficient to show necessity for the mistrial. Under these circumstances, we believe that the judge properly exercised his discretion.

[2] Based on exceptions duly noted in the record and brought forward and argued in her brief, defendant further contends that the trial judge erred in requiring her to proceed without counsel representing her and allowing her to proceed pro se without giving her the instructions provided in G.S. 15A-1242, which in pertinent part provides:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In responding to defendant's contentions in her brief, the State merely states that the trial judge did not err under this factual

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situation where "defendant's contumacious behavior made it impossible for [her] attorneys . . . to effectively represent her." The State does not respond to defendant's argument that the trial judge did not comply with G.S. 15A-1242 when defendant chose to undertake to represent herself.

We have held that the provisions of G.S. 15A-1242 are mandatory in every case where defendant requests to proceed pro se. *State v. Michael*, 74 N.C. App. 118, 327 S.E. 2d 263 (1985). In the present case, although the trial judge had a lengthy discussion with defendant regarding the case, he did not advise her of the consequences of her decision to proceed pro se or the nature of the charges and proceedings and the range of permissible punishments. Because of this error, defendant is entitled to a new trial.

The judgment is reversed and the cause remanded to superior court for a new trial.

New trial.

Judges BECTON and PARKER concur.

IN THE MATTER OF: FIRST CITIZENS BANK & TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF MARY RUTH FLEMING; FIRST CITIZENS BANK & TRUST COMPANY, AS TRUSTEE UNDER THE WILL OF ARCHIE F. FLEMING, JR. v. THOMAS POE FLEMING, MARTHA RACHEL McNALLY, CLIFTON EARL FLEMING, JR., DOUGLAS SYLVESTER FLEMING, GERRY ELLIOTT McFARLAND, BENJAMIN WILSON ELLIOTT, III, LAWRENCE NELSON ELLIOTT, ROBERT DAY ELLIOTT, MARGARET ELLIOTT RUFF, ELON COLLEGE, SALEM ACADEMY AND COLLEGE, AND FIRST PRESBYTERIAN CHURCH OF MOREHEAD CITY

No. 853SC229

(Filed 29 October 1985)

Wills § 40.4— power of appointment—not mentioned in residuary clause of donee's will—not exercised

The trial court did not err by holding that a general residuary clause in a will failed to exercise a power of appointment established in a trust because it did not refer to the power of appointment. A power of appointment does not concern the "execution and attestation" of a will within the meaning of G.S. 31-4; to hold that G.S. 31-4 nullifies the specific reference requirements would

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be to prevent a testator from guarding against inadvertent exercise of a general power even if he were particularly concerned about such inadvertence.

APPEAL by defendant, First Presbyterian Church of Morehead City, from *Winberry, Judge*. Order entered 7 January 1985 in Superior Court, CARTERET County. Heard in the Court of Appeals 14 October 1985.

This is a declaratory judgment action wherein plaintiff bank seeks proper disposition of a trust fund held by the bank. From judgment on the pleadings, defendant church appealed.

Stanley & Simpson, by Richard L. Stanley, for First Presbyterian Church of Morehead City, defendant, appellant.

Womble Carlyle Sandridge & Rice, by Linwood L. Davis and Michael E. Ray, for Salem Academy and College and Elon College, defendants, appellees.

HEDRICK, Chief Judge.

The central issue on this appeal is whether a general residuary clause in a will constitutes an effective disposition of property under a power of appointment which purports to require a specific reference to the power of appointment in the document making the disposition.

The power of appointment at issue reads as follows:

So much of the principal of this trust as shall remain in the hands of my Trustee at the time of the death of my wife shall be transferred and delivered, discharged of the trust, to such appointee or appointees of my wife, including my wife's estate, and in such amounts or proportions and upon such terms and provisions as my wife shall appoint and direct in an effective will or codicil specifically referring to this power of appointment If this power of appointment shall not be effectually exercised as aforesaid as to all or any portion of such principal, so much of the said principal as shall not have been disposed of by the effectual exercise of such power of appointment shall pass as a part of the remainder of my residuary estate and be disposed of in accordance with the provisions of Items hereinafter set forth as if I had died on the date of my wife's death.

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The residuary clause which appellant claims exercised the power of appointment states in pertinent part:

ITEM FIVE

All the residue of my estate remaining after the payment of all taxes, inheritance and estate, costs of administration, funeral expenses and debts I will, devise and bequeath to my Executor and do direct that my said Executor shall immediately liquidate my estate in such manner as it may deem proper and appropriate and distribute the proceeds thereof as follows. . . .

The trial court ruled that because Mary Fleming's will failed to refer to the power of appointment, the will did not exercise her power.

Appellant contends that G.S. 31-4 nullifies the requirement of specific reference. G.S. 31-4 provides that:

No appointment, made by will in the exercise of any power, shall be valid unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

We are now called upon to interpret G.S. 31-4 for the first time in the statute's 140 year history. We declined to hold that G.S. 31-4 nullified a provision in a power of appointment requiring specific reference in *Bank v. Moss*, 32 N.C. App. 499, 233 S.E. 2d 88, *disc. rev. denied*, 292 N.C. 728, 235 S.E. 2d 783 (1977), by deciding the case on other grounds. We now hold that a provision calling for reference to a power of appointment does not concern the "execution and attestation" of a will within the meaning of G.S. 31-4.

In North Carolina and a minority of other states, a power of appointment upon which no restrictions are imposed is exercised by a residuary clause. G.S. 31-43; *Trust Co. v. Hunt*, 267 N.C. 173, 148 S.E. 2d 41 (1966). It has been suggested that this rule was originally created to guard against the inadvertent failure of a life

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tenant to exercise a general power of appointment. *Trust Co. v. Hunt*, 267 N.C. 173, 148 S.E. 2d 41 (1966).

In a majority of American jurisdictions, however, residuary clauses do not exercise a power unless the power is mentioned in the residuary clause. Thus, a majority of American jurisdictions are more concerned with the inequity of inadvertent exercise of powers of appointment than of inadvertent failure to exercise powers of appointment. To hold that G.S. 31-4 nullifies specific reference requirements would be to prevent a testator from guarding against inadvertent exercise of a general power even if he were particularly concerned about such inadvertence.

None of the eighteen American jurisdictions with statutory schemes similar to North Carolina's have faced the question presented today. However, the English statutes upon which North Carolina's scheme was based have been interpreted in accord with this opinion. *Phillips v. Cayley*, 43 Ch. D. 222 (C.A. 1889). Other jurisdictions with statutory schemes similar to North Carolina's have reached the result we reach here by statute. *See, e.g.,* Wis. Stat. Ann. Sec. 232.44 (1957). The only legal scholar to address the question presented in the context of the North Carolina statutory scheme argued that the language in the North Carolina statute suggests the result we reach today. Rabin, *Blind Exercises of Powers of Appointment*, 51 Cornell L.Q. 1, 14-17 (1965). We therefore hold that in order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made.

Appellant also argues that because the meaning of both the phrase "specifically referring to this power of appointment" in Archie Fleming's will, and the residuary clause in Mary Fleming's will, are ambiguous, judgment on the pleadings was improper. There may be ambiguity in both provisions. *Bank v. Moss*, 32 N.C. App. 499, 233 S.E. 2d 88, *disc. rev. denied*, 292 N.C. 728, 235 S.E. 2d 783 (1977). However, the ambiguity is not significant in the context of this action. No conceivable interpretation of the two wills could make Mary Fleming's residuary clause meet the specific reference requirement created by Archie Fleming's will. We find no error.

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Affirmed.

Judges BECTON and PARKER concur.

LEROY BRITTAIN AND WIFE, JUNIE BRITTAIN v. BILLY CORRELL AND WIFE,
HELEN CORRELL

No. 8525SC131

(Filed 29 October 1985)

1. Adverse Possession § 17.1— color of title— sufficiency of deed

A deed purporting to convey the property in dispute to the respondents as part of a larger tract constituted sufficient color of title.

2. Adverse Possession § 3— possession under color of title—mistaken belief of ownership

The rule that there is no adverse possession when one possesses property without color of title under the mistaken belief that the property is his since there is no intent to claim the property adverse to its true owner does not apply where possession is under color of title.

APPEAL by petitioners from *Ferrell, Judge*. Judgment entered 11 October 1984 in BURKE County Superior Court. Heard in the Court of Appeals 19 September 1985.

In November 1982, petitioners instituted this proceeding seeking a determination of the true boundary line between land owned by them and land owned by respondents. Petitioners alleged that respondents built a fence and other outbuildings which encroach upon their land as described in the deed to their property, and requested, in addition to the above determination, that respondents be ordered to remove such encroachments from their property. Respondents admitted that they built a fence and other outbuildings on their property and denied that such items were located on petitioners' property. Respondents further counterclaimed for title to the disputed property on theories of adverse possession for more than 20 years, adverse possession under color of title for more than 7 years, and equitable estoppel.

The evidence presented at trial shows that petitioners and respondents have a common source of title to their adjacent tracts of land, that source being Foy and Mellie Brittain. Peti-

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tioners obtained their tract of land from Foy and Mellie Brittain by deed dated 2 November 1957. Respondents purchased their tract of land from Horace and Ethel Rhoney in October 1965 who had obtained the property from Foy and Mellie Brittain in February 1960. Petitioners presented evidence showing that a survey had been done using the calls in their deed which showed that the boundary line between the two tracts of land was located on a line marked A to B on their survey map. Respondents presented similar evidence showing that a survey had been done using the calls in their deed which located the boundary line on a different line marked on their exhibit as X to Y. The evidence further shows that the fence and other outbuildings built by respondents are located for the most part between the lines A to B and X to Y.

Both parties moved for a directed verdict in their favor at the close of all the evidence which motions were apparently denied. The jury answered the issues submitted as follows:

1. Is the dividing line between the lands of the Petitioners and the Respondents located as the line A to B on the map, Petitioner's Exhibit No. 2, as contended for by the Petitioners?

ANSWER: Yes

2. If so, did the Respondents acquire title to the property in dispute lying between the lines A to B on Petitioner's Exhibit No. 2, and X to Y, on Respondent's Exhibit No. 1, by adverse possession for a period of greater than seven years under color of title?

ANSWER: Yes

After the verdict was announced, petitioners moved for judgment notwithstanding the verdict and, alternatively, for a new trial on the grounds that the verdict is against the weight of the evidence and the law of the case. The motions were denied and judgment was entered in accordance with the verdict. Petitioners appealed.

H. Clinton Cheshire for petitioners.

Ted S. Douglas for respondents.

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WELLS, Judge.

[1] Petitioners contend the court erred in denying their motions for a directed verdict, judgment notwithstanding the verdict, and a new trial on respondents' claim for title to the disputed property under the doctrine of adverse possession under color of title. They argue that respondents did not contend or present any evidence tending to show that they possessed any document which could constitute color of title, that respondents showed only that they had a valid deed to their tract of land, and that therefore the evidence was insufficient to support a verdict for respondents on this claim.

As stated by our Supreme Court in *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E. 2d 766 (1969):

Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance When the description in a deed embraces not only land owned by the grantor but also contiguous land which he does not own, the instrument conveys the property to which grantor had title and constitutes color of title to that portion which he does not own. [Citations omitted.]

A valid deed may serve as color of title. *Id.* See also *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973).

We conclude that the deed offered into evidence by respondents which purported to convey to them the property in dispute between the lines A to B and X to Y as part of the tract of land conveyed to them by the Rhoneys is sufficient to constitute color of title. Thus, the evidence is not fatally deficient as argued by petitioners and we find no error in the denial of their motions.

[2] Petitioners further contend the trial court erred by instructing the jury on the doctrine of adverse possession under color of title when the evidence did not show that respondents' possession of the property was hostile to petitioners or under color of title. For the reasons just stated, we conclude that sufficient evidence of color of title was presented to justify the instruction given. Petitioners argue that the evidence shows that respondents' possession was not hostile because it shows that respondents

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made the improvements on the disputed property under the belief that they owned the property.

It is an established rule in this State that where one possesses property without color of title under the mistaken belief that the property is his, the possession is not adverse since there is no intent to claim the property adverse to its true owner. Hetrick, *Webster's Real Estate Law in North Carolina* §§ 289 & 293 (rev. ed. 1981). See, e.g., *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951). This rule does not apply, however, where possession is under color of title. Hetrick, *supra*, ch. 14 nn. 19 & 62. Application of this rule in color of title cases would virtually extinguish the laws permitting the acquisition of title by adverse possession under color of title since in almost all such cases the claimant possessed the property under the mistaken belief that he had good title to it. *Id.*

The trial court in instructing the jury on the hostility of possession required in order to ripen title by adverse possession followed N.C.P.I.—Civil 820.10. The instruction given was an accurate statement of the law, see *State v. Brooks*, 275 N.C. 175, 166 S.E. 2d 70 (1969); *Dulin v. Faires*, 266 N.C. 257, 145 S.E. 2d 873 (1966), and was warranted by the evidence which clearly tends to show that respondents' possession of the disputed property was such as to give notice that respondents claimed the exclusive right to the property. We therefore find no error in the court's instruction on, or submission of, the issue of respondents' adverse possession under color of title. Because we so hold, we need not address respondents' cross-assignment of error.

No error.

Judges WHICHARD and PHILLIPS concur.

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FRED MILLS AND WIFE, SUDIE W. MILLS v. NEW RIVER WOOD CORPORATION

No. 858SC182

(Filed 29 October 1985)

1. Deeds § 28; Uniform Commercial Code § 3— contract for sale of timber—statute of limitations—applicability of UCC

A contract for the sale of timber to be cut is governed by Art. 2 of the Uniform Commercial Code and the four-year statute of limitations of G.S. 25-2-725(1), and plaintiffs' action to recover for breach of the covenants in a timber deed was timely filed where it was instituted within four years after defendant's cutting operations had commenced.

2. Evidence § 33.2— hearsay testimony—absence of prejudice

Assuming that testimony by the male plaintiff as to the position of the Federal Land Bank regarding small trees on plaintiffs' land should have been excluded as hearsay, defendant was not prejudiced by the admission of such testimony. G.S. 1A-1, Rule 61.

3. Evidence § 56— opinion of fair market value of lands—qualification of expert

A witness was qualified to state his opinion as to the fair market value of plaintiffs' lands had timber thereon been cut according to accepted plans and practices of the timbering and logging businesses where the witness testified that he had been involved in the logging and timber business either directly or indirectly from 1946 until the time of suit and that he was aware of comparable tracts of land sold in plaintiffs' area and the price per acre for which these tracts sold.

4. Appeal and Error § 24— directed verdict on counterclaims—failure to object at trial

Where defendant made no objection at trial to the granting of plaintiffs' motion for directed verdict on defendant's counterclaims, he may not raise this question for the first time on appeal.

5. Appeal and Error § 31.1— failure to object to charge at trial

Defendant's argument that the trial court erred in failing to give equal stress to its contentions and erred in the instructions on the burden of proof will not be considered on appeal where defendant failed to object to the charge at trial. G.S. 1A-1, Rule 10(b)(2).

6. Contracts § 29.5; Interest § 2— breach of contract—prejudgment interest

The trial court did not err in awarding prejudgment interest from 1 September 1978 for breach of a covenant in a timber deed where the testimony of plaintiffs' expert witness allowed ascertainment of the damages as well as a determination that the breach occurred and the damages were complete prior to 1 September 1978. G.S. 24-5.

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APPEAL by defendant from *Bruce, Judge*. Judgment entered 8 October 1984 *nunc pro tunc* 20 September 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 25 September 1985.

Defendant entered the land of plaintiffs pursuant to a timber deed executed by plaintiffs conveying all merchantable timber to defendant. Plaintiffs sued for damage to the trees left on the property alleging unnecessary harm thereto in violation of covenants in the timber deed. Defendant counterclaimed alleging malicious prosecution and abuse of process.

The trial court allowed plaintiffs' motion for directed verdict as to both counterclaims. The jury found that defendant breached the provisions of the timber deed and awarded plaintiffs damages of \$11,163. The court entered judgment in accordance with the verdict and ordered that defendant pay interest on the \$11,163 award from 1 September 1978.

From the judgment entered, defendant appeals.

Allen, Hooten & Hodges, by John M. Martin, for plaintiff appellees.

Jones & Wooten, by Lamar Jones, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the action is barred by the three-year statute of limitations in N.C. Gen. Stat. 1-52. We find that statute inapplicable. Contracts for the sale of "timber to be cut" are governed by Article 2 of the Uniform Commercial Code, N.C. Gen. Stat. 25-2-107(2). Accordingly, the controlling statute is N.C. Gen. Stat. 25-2-725(1), which provides for a four-year period of limitation. The timber deed, which evidenced the underlying contract of sale, was executed on 28 June 1977. Plaintiffs instituted this action on 28 April 1981. Since defendant's cutting operations commenced after execution of the timber deed, plaintiffs instituted their action within the requisite four-year period.

[2] Defendant contends the court erred in admitting hearsay testimony by plaintiff-husband as to the position of the Federal Land Bank regarding the small trees on plaintiffs' land. Assuming that this testimony should have been excluded, its admission does

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not require a new trial unless defendant's case was adversely affected thereby. N.C. Gen. Stat. 1A-1, Rule 61; *see Fisher v. Thompson*, 50 N.C. App. 724, 728, 275 S.E. 2d 507, 511 (1981). Having carefully reviewed the record, we hold that defendant did not suffer prejudice from the admission of this testimony.

[3] Defendant contends the court erred in permitting plaintiffs' expert witness in the field of timber and pulpwood operations to give his opinion as to the fair market value of the lands had the timber been cut according to accepted plans and practices of the timbering and logging businesses. It argues that the witness lacked sufficient experience and familiarity with accepted cutting practices of timber and pulpwood in 1977 and 1978 to render an opinion on the subject. We disagree.

Witnesses who are experts in a field may offer opinion testimony regarding matters within the area of their expertise. If a witness is better qualified than the jury to form an opinion from certain facts, his opinion is admissible. *Cochran v. City of Charlotte*, 53 N.C. App. 390, 398-99, 281 S.E. 2d 179, 186 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E. 2d 380 (1982), *citing* 1 Stansbury, *North Carolina Evidence* Sec. 132 at 425 (Brandis Rev. 1973). N.C. Gen. Stat. 8C-1, Rule 702, which applies to this case, codified and perhaps liberalized this common law principle. *See* 1 H. Brandis, *North Carolina Evidence* Sec. 134 at 520 n. 25 and 1983 Supp. thereto.

Evidence here supported findings that the witness was an expert in the field of timber and pulpwood operations. The witness testified that he had been involved in the logging and timber business either directly or indirectly from 1946 until the time of suit. Further, the witness related familiarity and experience which gave him special knowledge and expertise regarding the value of property in the area of plaintiffs' land. He testified that he was aware of comparable tracts of land sold in plaintiffs' area between 1977 and 1979 and the price per acre for which these tracts sold. The court properly could find from this evidence that the witness was better qualified than the jurors to render an opinion as to the fair market value of the land had there been no breach of the timber deed.

[4] Defendant contends the court erred in granting plaintiffs' motion for directed verdict on defendant's counterclaims for

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malicious prosecution and abuse of process. Defendant did not object to the granting of the motion at trial, however. To the contrary, counsel for defendant informed the court that defendant did not wish to proceed on its counterclaims. Having made no objection at trial, defendant may not now raise this question for the first time on appeal. *Hamm v. Texaco, Inc.*, 17 N.C. App. 451, 454, 194 S.E. 2d 560, 562 (1973). Moreover, the counterclaims clearly lacked merit.

[5] Defendant contends the court erred in failing to give equal stress to its contentions in the instructions to the jury, in violation of N.C. Gen. Stat. 1A-1, Rule 51(a). It also contends the court improperly charged the jury that plaintiffs must prove that "more likely than not the defendant breached an obligation . . . under the . . . contract." Defendant failed to object to the charge at trial, however, as required by N.C. R. App. P. 10(b)(2). This rule is mandatory and not merely directory. *State v. Fennell*, 307 N.C. 258, 263, 297 S.E. 2d 393, 396 (1982). It was designed to avoid unnecessary new trials caused by errors in instructions that the court could have corrected if brought to its attention at the proper time. *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E. 2d 571, 574 (1984). Because defendant did not comply with Rule 10(b)(2), we decline to consider these arguments. We note that our Supreme Court has declined to apply the "plain error" rule to civil cases. *See Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E. 2d 372, 377 (1984).

[6] Defendant contends that the court erred in awarding prejudgment interest from 1 September 1978. Our Supreme Court has stated that "[w]hen the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of breach." *General Metals v. Manufacturing Co.*, 259 N.C. 709, 713, 131 S.E. 2d 360, 363 (1963). *See also* N.C. Gen. Stat. 24-5. The record provides ample relevant evidence from which to ascertain the amount of damages. Plaintiffs' expert witness testified at length about the reduction in fair market value of plaintiffs' land from defendant's breach of the covenant in the timber deed. He also established that the damage was complete "within the summer months of 1978." This evidence allowed ascertainment of the damages as well as a determination that the breach occurred and the damages were complete prior to 1 September 1978. Pursuant

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to *General Metals, supra*, we thus hold that the court did not err in awarding interest from 1 September 1978.

No error.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. RICHARD ARLIN GEORGE

No. 8420SC1217

(Filed 29 October 1985)

1. Criminal Law § 75.15; Automobiles and Other Vehicles § 126.5— incriminating statements by defendant—not so impaired as to prevent a voluntary waiver of rights

In a prosecution for driving while impaired in which defendant had admitted taking 72 sleeping pills with a can of beer, the trial court did not err by denying defendant's motion to suppress those statements, based on his contention that he was too impaired by the sleeping pills to make an intelligent and voluntary waiver, where the arresting officer testified that in his opinion defendant's faculties were appreciably impaired because of defendant's swaying and from the way he talked, defendant was able to follow instructions applicable to sobriety tests administered by the officer and to read and sign the waiver of rights form, and there was no evidence that defendant was not conscious of his words.

2. Automobiles and Other Vehicles § 127.1— driving while impaired—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired where the evidence was that an officer observed defendant's vehicle weaving back and forth across the highway; when defendant was stopped the officer observed the odor of alcohol on his breath, slurred speech, an unsteady walk, and that defendant had failed to stop within a reasonable time for a blue light; defendant failed to perform satisfactorily on field sobriety tests; and defendant admitted having taken 72 sleeping pills. G.S. 20-138.1, G.S. 20-4.01(48a).

APPEAL by defendant from *Walker, Judge*. Judgment entered 12 July 1984 in Superior Court, UNION County. Heard in the Court of Appeals 28 August 1985.

On 22 February 1984 at approximately 9:55 p.m., Officer David Williams observed defendant driving a motor vehicle in

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Monroe, North Carolina. Defendant was stopped for driving while impaired, arrested and transported to the police department for a breathalyzer test. Before administering the breathalyzer test, Williams advised defendant of his constitutional rights. The breathalyzer reading was .00. The defendant was again advised of his constitutional rights, and in response to questioning by Williams, defendant stated that he had taken 72 Revco sleeping pills around 9:30 p.m., and that he had swallowed the pills with a can of beer. Upon a jury verdict of guilty of driving while impaired, the court imposed Level Five punishment. Defendant appealed.

Attorney General Thornburg by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Harry B. Crow, Jr., for defendant appellant.

PARKER, Judge.

[1] In his first assignment of error, defendant contends the court erred in denying his motion to suppress the statements made to Officer Williams because defendant did not intelligently and voluntarily waive his Fifth, Sixth and Fourteenth Amendment rights before making these statements. This argument is without merit.

The trial court held a *voir dire* examination during which Officer Williams was the only witness to testify. Based on this testimony, the court concluded that defendant's statement was admissible. The trial court did not make findings of fact to show the basis of his ruling, but "[w]here no material conflict in the evidence on *voir dire* exists, it is not error to admit a confession without making specific findings of fact . . ." *State v. Siler*, 292 N.C. 543, 549, 234 S.E. 2d 733, 737 (1977).

The thrust of defendant's argument is that he could not have waived his constitutional rights because he was too impaired by the sleeping pills to make an intelligent and voluntary waiver. Defendant relies on Officer Williams' testimony that in his opinion from the way defendant swayed and from the way defendant talked, defendant's faculties were appreciably impaired. However, our Supreme Court, in *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981), addressed a similar argument as follows:

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The fact that defendant was intoxicated at the time of his confession does not preclude the conclusion that defendant's statements were freely and voluntarily given. An inculpatory statement is admissible unless the defendant is so intoxicated as to be unconscious of his words.

Id. at 69, 277 S.E. 2d at 420.

Notwithstanding defendant's sleepy, unsteady condition, he was able to follow instructions applicable to the sobriety tests requested by Williams and to read and sign the waiver of rights form. There was no evidence that defendant was unconscious of his words. The State carried its burden that the statements were voluntarily made. The trial judge's ruling, which denied defendant's motion to suppress, was supported by competent evidence and will not be disturbed on appeal. *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867 (1967). This assignment of error is overruled.

[2] Next, defendant contends the court erred in denying his motion to dismiss at the close of the State's evidence and at the close of all evidence. Although defendant waived his right to assert the denial of his motion for a dismissal at the close of the State's evidence by presenting evidence at trial, defendant's motion to dismiss made at the close of all evidence properly preserves for consideration the sufficiency of the evidence to go to the jury. *State v. Dow*, 70 N.C. App. 82, 318 S.E. 2d 883 (1984). All evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

Defendant was charged under G.S. 20-138.1 which provides:

(a) Offense—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance;

...

This offense is proven by evidence that defendant drove a vehicle on any highway in this state while his physical or mental faculties, or both, were "appreciably impaired by an impairing

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substance." G.S. 20-4.01(48a). Officer Williams testified that he observed defendant's vehicle weaving back and forth across the highway. When defendant was stopped, Williams observed that he had the odor of alcohol on his breath, that his speech was slurred, that his walk was unsteady, and that he failed to stop within a reasonable time after Williams turned on his blue lights. Williams also testified that defendant failed to perform satisfactorily on the field sobriety tests. This evidence, coupled with defendant's admission to having taken 72 sleeping pills, was sufficient evidence to go to the jury on the charge of driving while impaired. Defendant's argument that he was "forced" to take the stand to defend against what he asserts were improperly admitted statements has been rejected by our Supreme Court in *State v. McDaniel*, 272 N.C. 556, 158 S.E. 2d 874 (1968).

We find defendant received a fair trial, free from prejudicial error.

No error.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. MICHAEL DEAN JOHNSON

No. 8524SC181

(Filed 29 October 1985)

1. Indictment and Warrant § 10— defendant's name not in body of indictment

Indictments were not invalid because defendant's name was not set forth in the body of the indictments but appeared only in the captions.

2. Larceny § 4.2— ownership of property stolen—absence of allegation

An indictment for larceny was fatally defective where it failed to allege the ownership, possession or right to possession of the property stolen.

3. Larceny § 7.3— variance as to ownership of property stolen

There was a fatal variance between indictment and proof where a larceny indictment alleged that stolen letter openers were the property of a Catholic church but the evidence showed that they belonged to a priest.

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APPEAL by defendant from *Lamm, Judge*. Judgments entered 18 October 1984 in Superior Court, WATAUGA County. Heard in the Court of Appeals 24 September 1985.

Attorney General Thornburg, by Assistant Attorney General Michael Rivers Morgan, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of two counts of felonious breaking or entering and two counts of felonious larceny. In this Court for the first time he challenges the sufficiency of the two indictments that he was tried on. This is permitted by our law since jurisdiction to try an accused for a felony depends upon a valid bill of indictment. N.C. Constitution art. I, Sec. 22; *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969). And an indictment that does not allege all of the essential elements of the offense is invalid. *State v. Crabtree*, 286 N.C. 541, 212 S.E. 2d 103 (1975).

[1] The first deficiency in the indictments, so defendant contends, is that they do not charge him with committing the crimes referred to therein because his name is not set forth in the body of either indictment. This contention is without merit and we overrule it. Each indictment is captioned "STATE VERSUS MICHAEL DEAN JOHNSON" and states immediately thereafter, "The jurors for the State upon their oath present that on or about the 9th day of August, 1984 in the County named above *the defendant named above* unlawfully, willfully, and feloniously" did break and enter a certain building. (Emphasis supplied.) And each indictment's larceny allegation, which follows the breaking and entering count, is in this same, identical form. That the allegations clearly charge that defendant committed the offenses involved, and that he would not have been any better informed of that fact if his name had been inserted in place of the words "the defendant named above," is obvious, and defendant does not really contend otherwise. His contention, when sifted down, is simply that *State v. Simpson*, 302 N.C. 613, 276 S.E. 2d 361 (1981) requires that the name of the defendant as the person charged be stated in the body of the indictment. We do not understand that decision to be so restrictive. What *State v. Simpson* stands for, in our opin-

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ion, is that to be valid an indictment *must either name or otherwise identify* the defendant as the one charged with committing the offenses, and the indictments in this case meet that requirement. The indictment in *Simpson* failed because it neither named nor otherwise identified the defendant as the offender; at the place where defendant's name or identifying reference should have been there was just a blank space.

[2, 3] The next deficiency in the indictments, so defendant contends, is that they do not properly allege the larcenies that he was convicted of. This contention is well taken. A valid indictment for larceny must allege the ownership, possession or right to possession of the property stolen, and an indictment that fails to so allege is fatally defective. *State v. Jessup*, 279 N.C. 108, 181 S.E. 2d 594 (1971). In case 84CRS3968, the indictment charges defendant with breaking or entering a building in Boone occupied by Watauga Opportunities, Inc. and stealing therefrom certain articles of personal property—but the indictment is completely silent as to ownership, possession, and right to possess. And in case 84CRS3969, while the indictment charges defendant with breaking or entering a building occupied by St. Elizabeth Catholic Church and stealing two letter openers, the personal property of St. Elizabeth Catholic Church, the evidence did not show that the church either owned or had any special property interest in the letter openers; it showed, rather, that the articles belonged to Father Connolly. This is a fatal variance between indictment and proof, and the judgment thereon is invalid. *State v. Downing*, 313 N.C. 164, 326 S.E. 2d 256 (1985). Both larceny convictions must be and are vacated. The defendant's other assignments of error are without merit.

In case 84CRS3969, the sentence for breaking or entering must be vacated and the defendant resentenced because the court combined that count with the larceny count for sentencing. In case 84CRS3968, in sentencing defendant the counts were treated separately and the sentence imposed on the breaking and entering count is not disturbed.

No. 84CRS3968—Breaking or entering—no error.

No. 84CRS3968—Felonious larceny—vacated.

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No. 84CRS3969—Breaking or entering—vacated and remanded for resentencing.

No. 84CRS3969—Felonious larceny—vacated.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. JERRY SIMPSON

No. 8512SC180

(Filed 29 October 1985)

1. Criminal Law § 73.4— assault with a deadly weapon—exclamation of bystander—startling event or condition

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by admitting the testimony of a witness that a bystander said, "Don't cut that man." The statement was made while the declarant was observing a bloody fight and was admissible under G.S. 8C-1, Rule 803(2) (Cum. Supp. 1981).

2. Assault and Battery § 14.5— evidence of knifing—evidence sufficient

There was sufficient evidence to support defendant's conviction for assault with a deadly weapon inflicting serious injury where the evidence tended to show that the victim was struck across the face and chest by defendant, cutting the victim; thirty-two and thirty-six stitches were required to close the facial and chest wounds; the victim was hospitalized for three days; although the victim did not actually see a knife, another witness saw a knife fall to the ground between the victim and defendant as they tussled; and the witness also testified that he could tell someone had been cut because the knife was red.

3. Criminal Law § 138— assault with a deadly weapon inflicting serious injury—mitigating factors—no error

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury by striking out the words "significantly" and "strong" from the factors that defendant committed the offense under a threat which was insufficient to constitute a defense but significantly reduced his culpability and that defendant acted under strong provocation. Even assuming that the court's deletion of the words constituted a failure to find the statutory mitigating factors, there was no error because the evidence of those factors was not uncontradicted and manifestly credible in that the victim denied making any threats or doing anything to provoke the defendant.

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APPEAL by defendant from *Brewer, Judge*. Judgment entered 5 November 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 24 September 1985.

Defendant was charged in an indictment with assault with a deadly weapon with intent to kill inflicting serious injury. He was convicted of assault with a deadly weapon inflicting serious injury. From a judgment imposing an active sentence of seven years, which exceeded the presumptive term of three years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

JOHNSON, Judge.

The issues in this appeal concern the admission of hearsay evidence, the sufficiency of the evidence, and the court's failure to find statutory mitigating factors. For the following reasons, we conclude that the judgment and the trial are free of error.

[1] The first issue is whether the court erred in admitting the testimony of a witness that a bystander, a boy named Bobby, said, "Don't cut that man." Defendant contends that the testimony was inadmissible hearsay. We disagree. Since this case was tried after 1 July 1984, the North Carolina Rules of Evidence apply. 1983 Sess. Laws, c. 701, s. 3; *see* G.S. 8C-1. Under G.S. 8C-1, Rule 803(2) (Cum. Supp. 1981), a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the condition or event" is admissible even if the declarant is available as a witness. Rule 803(2) is merely a continuation of the long-standing rule in North Carolina that exclamations of a bystander concerning a startling or unusual event, made spontaneously and without time for reflection or fabrication, are admissible. *See State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981); 1 Brandis, North Carolina Evidence sec. 164 (2d Rev. Ed. 1982). Here, the statement was made while the declarant was observing a bloody fight. The statement, therefore, was properly admitted.

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[2] The second issue is whether there was sufficient evidence to support defendant's conviction for assault with a deadly weapon inflicting serious injury. Defendant argues there was insufficient evidence that defendant assaulted the victim with a knife. Again, we disagree. Taken in the light most favorable to the State, the evidence tends to show that the victim was struck across the face and chest by defendant, cutting the victim. Thirty-two and thirty-six stitches were required to close the facial and chest wounds, respectively. The victim was hospitalized for three days. Although the victim did not actually see a knife, another witness saw a knife fall to the ground between the victim and defendant as they tussled. The witness also testified that he could tell someone had been cut because the knife was red. We hold the foregoing evidence was sufficient to support a jury finding that defendant assaulted the victim with a knife.

[3] The remaining issue is whether the court erred in failing to find as mitigating factors (1) that the defendant committed the offense under threat which was insufficient to constitute a defense but significantly reduced his culpability; and (2) that the defendant acted under strong provocation. In sentencing defendant, the court made the foregoing findings but struck out the words "significantly" and "strong." Defendant argues that by striking out these words, the court in effect failed to find these statutory mitigating factors. Assuming *arguendo* that the court's deletion of the words constituted a failure to find the statutory mitigating factors, we conclude the court did not err in failing to make such findings. A court is required to find a statutory mitigating factor only if the evidence supporting it is uncontradicted and manifestly credible. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The evidence in the present case was not uncontradicted and manifestly credible, as the victim denied making any threats or doing anything to provoke the defendant.

For the foregoing reasons, we find

No error.

Judges WEBB and PHILLIPS concur.

Smith v. Mariner

CLAUDE F. SMITH, JR. v. JOSEPH Y. MARINER AND MARY ANNE B. MARINER

No. 8520SC288

(Filed 29 October 1985)

1. Appeal and Error § 6.3; Venue § 9— denial of venue change as matter of right—appeal not premature

Appeal from the denial of a motion for change of venue as a matter of right pursuant to G.S. 1-76(4) was not premature.

2. Venue § 5— recovery of stock certificates—change of venue not required

Stock certificates are not the kind of personal property which would require a change of venue under G.S. 1-76(4) and G.S. 1-83(1) to the county where the certificates are located.

3. Venue § 8— change for convenience of witnesses and ends of justice—insufficient showing

Defendant failed to show that the convenience of the witnesses and the ends of justice required the trial court to change venue from Richmond County where plaintiff resided to Mecklenburg County where all the attorneys and all the witnesses except plaintiff resided. G.S. 1-83(2).

4. Rules of Civil Procedure § 52— ruling on motion—necessity for findings

The trial court is required to make findings of fact in ruling upon a motion only when requested by a party. G.S. 1A-1, Rule 52(a)(2).

APPEAL by defendant Mary Anne B. Mariner from *Helms, Judge*. Order entered 8 October 1984 in RICHMOND County Superior Court. Heard in the Court of Appeals 17 October 1985.

Plaintiff instituted this action alleging that he entered into an agreement with defendant Joseph Y. Mariner in which they agreed that plaintiff would provide funds to defendant Joseph Mariner to enable Mariner to purchase stock in Ruddick Corporation. He also alleged that the stock was to be registered in the name of defendant Joseph Mariner, subject to an agreement that the stock would be transferred to plaintiff or his nominees on demand or upon the termination of the employment of Mariner by Ruddick Corporation or its subsidiaries. Plaintiff further alleged that defendants have refused his demand for the stock certificates. In his prayer for relief, he sought to recover stock certificates purchased by defendants under the terms of the agreement; to require defendants to render an accounting; to recover the fair market value of any shares of Ruddick Corporation stock pur-

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chased pursuant to the agreement and sold or otherwise disposed of by defendants; and to restrain defendants from disposing of the stock.

Defendants filed separate answers and separately moved, pursuant to N.C. Gen. Stat. §§ 1-76(4), 1-83(1) & (2) (1983), and N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) of the Rules of Civil Procedure, for a change of venue to Mecklenburg County, where both defendants resided and where the stock certificates were located. The court denied the motions for change of venue. From the denial of her motion, defendant Mary Anne B. Mariner, the wife of defendant Joseph Mariner, appealed.

Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb & McDonnell, by James D. Monteith, for plaintiff.

Richard F. Harris, III for defendant Mary Anne B. Mariner.

WELLS, Judge.

[1, 2] Preliminarily we note that appellant is appealing from an interlocutory order, but since she is appealing from the denial of a change of venue as a matter of right pursuant to G.S. 1-76(4), her appeal is not premature. *Klass v. Hayes*, 29 N.C. App. 658, 225 S.E. 2d 612 (1976); *see also DesMarais v. Dimmette*, 70 N.C. App. 134, 318 S.E. 2d 887 (1984).

G.S. 1-76 provides in pertinent part:

Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated . . . (4) Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded.

Appellant argues that the recovery of the stock certificates is the sole or primary relief demanded in plaintiff's complaint; therefore, under G.S. 1-76(4), the action must be tried in Mecklenburg County where the stock certificates are located. We disagree.

The facts of the present case are remarkably similar to those of *Davis v. Smith*, 23 N.C. App. 657, 209 S.E. 2d 852 (1974). In that case, the plaintiff sought specific enforcement of an agreement in which the defendant was obligated to sell to the plaintiff his stock in a corporation if the defendant were discharged for unsatisfac-

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tory performance of his duties as president and general manager of the corporation. Defendant, contending that G.S. 1-76(4) required the action to be tried in the county where the stock certificates were located, filed a motion for a change of venue pursuant to G.S. 1-83(1). In affirming the denial of the motion, we observed that stock certificates, while tangible personal property, were merely tangible evidence, or symbols, of the shares they represent. For that reason and policy reasons, we concluded that stock certificates were not the kind of personal property which would require a change of venue under G.S. 1-76(4) and G.S. 1-83(1). We held that the action for the recovery of the stock certificates was incidental to the specific performance action for the recovery of the stock itself. *Accord, Klass v. Hayes, supra*. We agree with the reasoning of the opinion in *Davis v. Smith* and find it to be controlling in the present case.

[3] Appellant also contends that the court erred in failing to remove the action to Mecklenburg County pursuant to G.S. 1-83 (2). She argues that since all of the witnesses except plaintiff, and all of the attorneys reside in Mecklenburg County, the convenience of witnesses and the ends of justice would be better served if the matter were tried in Mecklenburg County rather than in Richmond County, one hour and thirty minutes away. It is well settled that a court's decision upon a motion for a change of venue pursuant to G.S. 1-83(2) will not be disturbed absent a showing of a manifest abuse of discretion. *Cooperative Exchange v. Trull*, 255 N.C. 202, 120 S.E. 2d 438 (1961); *Construction Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E. 2d 359 (1979). In the absence of a showing that the ends of justice demand a change of venue, or that the denial of the motion will deny appellant a fair trial, we find no abuse of discretion by the trial court.

[4] Appellant lastly contends that the court erred in failing to make findings of fact in ruling upon the motion. A trial court, however, is required to make findings of fact in deciding a motion only when requested by a party. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) of the Rules of Civil Procedure. We can find no such request in this record.

The order appealed from is

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Affirmed.

Judges ARNOLD and MARTIN concur.

IN THE MATTER OF: WILLIAM VANCE STALLINGS, JUVENILE

No. 8514DC257

(Filed 29 October 1985)

Criminal Law § 66.10; Infants § 17— showup without court order—inadmissible

The pretrial identification of a juvenile should have been suppressed where the identification was made in a showup without a court order in violation of G.S. 7A-596.

APPEAL by juvenile from *LaBarre, Judge*. Adjudication order entered 15 November 1984 in District Court, DURHAM County. Heard in the Court of Appeals 14 October 1985.

Petitioner was charged in a juvenile petition with the offense of felony breaking and entering. The transcript of the adjudicatory hearing discloses the following pertinent facts. On the morning of 5 October 1984 complainant Mrs. Knott went to her neighbor's house for a cup of coffee. After having coffee she and the neighbor stood at the rear of the neighbor's house, approximately 90 feet from Mrs. Knott's house, and observed two young white males leaving the Knott house from the side door. Mrs. Knott immediately yelled at the boys and gave chase, but lost them. She returned to her house, called the police, and gave them a description of the two boys. Detective Crabtree of the Durham County Sheriff's Department responded to the call, spoke briefly with Mrs. Knott and her neighbor, and then searched the neighborhood. He then proceeded about half a mile to a Seven Eleven Market where he found two young white males matching the description given by Mrs. Knott. Detective Crabtree placed the young men in the rear of his car, returned to Mrs. Knott's house, and asked Mrs. Knott "if they were the ones she saw coming out of her house." She responded affirmatively, and the boys were taken into custody.

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At the adjudicatory hearing, the boys were found guilty and from judgment entered on that finding, petitioner appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert E. Cansler, for the State.

Susan K. Seahorn for juvenile, petitioner.

HEDRICK, Chief Judge.

Petitioner's three assignments of error all arise from the denial of his motion to suppress testimony concerning Mrs. Knott's identification of him as the perpetrator of the offense on the day of the crime. He contends that the presentation of him to Mrs. Knott for her identification, commonly known as a "show-up," was carried out without a court order, thus violating statutory guidelines.

N.C. Gen. Stat. Sec. 7A-596 in pertinent part provides:

Nontestimonial identification procedures shall not be conducted on any juvenile without a court order issued pursuant to this Article unless the juvenile has been transferred to superior court for trial as an adult. . . . As used in this Article, "nontestimonial identification" means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and *lineups or similar identification procedures requiring the presence of a juvenile.*

(Emphasis added.) The statute does not specify "show-ups" as one of the identification procedures requiring court authorization, but it does specify "lineups or similar identification procedures requiring the presence of a juvenile."

We hold that a showup and a lineup are similar enough in purpose, practice, and effect so as to bring a showup within the contemplation of the statute. Indeed, a showup is inherently more susceptible to suggestive or improper use than a lineup and thus more in need of statutory protection. *See U.S. v. Wade*, 388 U.S. 218, 234, 87 S.Ct. 1926, 1936, 18 L.Ed. 2d 1149, 1161 (1967). We wish to emphasize, however, that our holding applies only to showups involving juveniles. Showups of adults do not require a

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court order and are admissible if due process requirements are met. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967); *State v. Sanders*, 33 N.C. App. 284, 235 S.E. 2d 94, *disc. rev. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977).

The court erred in denying petitioner's motion to suppress. Since all the evidence tending to identify petitioner as the perpetrator of the offense charged was based on evidence stemming from the improper showup, there is no evidence remaining to support the guilty verdict, and the judgment must be reversed.

Reversed.

Judges BECTON and PARKER concur.

BLIZZARD BUILDING SUPPLY, INC. v. BILLY SMITH

No. 858DC334

(Filed 29 October 1985)

Estoppel § 4.3— no equitable estoppel to assert statute of limitations

Defendant was not equitably estopped from asserting the statute of limitations of G.S. 1-52 as a bar to plaintiff's action on an account for the purchase of building supplies by a letter written by defendant's counsel to plaintiff's counsel in November 1980 asking that a lawsuit not be instituted "until we have had a chance to perhaps work this matter out" where plaintiff had until February 1982 to institute the action, and there was no evidence that the letter lulled plaintiff into a false security or misled plaintiff in any way.

APPEAL by plaintiff from *Exum, Judge*. Judgment entered 28 November 1984 in District Court, LENOIR County. Heard in the Court of Appeals 21 October 1985.

Plaintiff instituted this action on 15 June 1982 by filing a complaint in district court alleging that defendant purchased building supplies from plaintiff on an open account and owed plaintiff \$5,306.72. The claim was dismissed. Plaintiff initiated the present action on 3 June 1983. In its answer defendant alleged, as an affirmative defense, that the last payment on the account was made on 16 February 1979, therefore plaintiff's claim was barred by the three year statute of limitations. Plaintiff replied that

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defendant was equitably estopped from relying on the defense of the statute of limitations.

At the close of plaintiff's evidence the trial court granted defendant's motion for directed verdict. Plaintiff appealed.

Harrison and Heath, by Fred W. Harrison, for plaintiff, appellant.

Whitley and Coley, P.A., by William C. Coley III, for defendant, appellee.

HEDRICK, Chief Judge.

The sole question presented by this appeal is whether the trial court correctly directed verdict in favor of defendant on the grounds that plaintiff's claim is barred by the three year statute of limitations in G.S. 1-52. Plaintiff alleged that defendant was equitably estopped from relying on the statute of limitations because on 12 November 1980 counsel for defendant wrote to plaintiff's counsel with the request: "Please do not institute any lawsuit until we have had a chance to perhaps work this matter out."

The doctrine of equitable estoppel may be invoked to prevent a defendant from relying on a statute of limitations if the defendant, by deception or a violation of duty toward the plaintiff, caused the plaintiff to allow his claim to be barred by the statute of limitations. *Stereo Center v. Hodson*, 39 N.C. App. 591, 251 S.E. 2d 673 (1979). The essential elements of equitable estoppel, as related to the party sought to be estopped are: (1) conduct which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. *In re Will of Covington*, 252 N.C. 546, 114 S.E. 2d 257 (1960). The other party must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice. *Id.*

Defendant's motion for directed verdict presents the question of whether the evidence, viewed in the light most favorable to plaintiff, is sufficient for submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). We find that

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plaintiff's evidence, viewed in this light, fails to show the essential elements of equitable estoppel. Defendant's letters in November 1980 were an attempt to negotiate. Plaintiff did not allege that defendant misrepresented or concealed any material facts. After defendant's last letter plaintiff had until 16 February 1982 to institute this action. Plaintiff failed to introduce any evidence of defendant's actions which caused it to delay filing a complaint. There is no evidence that defendant's letters in November 1980 lulled plaintiff into a false security or misled plaintiff in any way.

Plaintiff has failed to prove equitable estoppel; its claim, therefore, was barred by the statute of limitations. As there was no issue for submission to the jury the trial court correctly directed verdict for defendant.

Affirmed.

Judges BECTON and PARKER concur.

IN THE MATTER OF: THE BOARD OF COMMISSIONERS OF DARE COUNTY,
TO WIT: ROBERT V. OWENS, CHAIRMAN, H. RUSSELL LANGLEY, THOMAS
B. GRAY, JOSEPH T. LAMB, JR., AND ORMAN L. MANN, AND DARE
COUNTY MANAGER JACK W. CAHOON

No. 851DC337

(Filed 29 October 1985)

Rules of Civil Procedure § 65; Injunctions § 12— mandatory injunction issued on court's initiative—no pending action—no notice or hearing—order void

An order issued by a district court judge to the county commissioners requiring the county to provide adequate court facilities and to make such facilities available at all times was void where the injunctive order was not issued incident to any pending action, no complaint was filed, no summons was issued, and there was no notice or opportunity to be heard.

APPEAL by Dare County Commissioners and Dare County Manager from *Chaffin, Judge*. Order entered 29 October 1984 in District Court, DARE County. Heard in the Court of Appeals 21 October 1985.

In March 1983, Dare County opened its newly constructed courthouse annex. The building was used for many functions, but

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the courtroom was reserved every Tuesday and Friday for District Court sessions.

Judge Chaffin, the Chief District Judge of the First Judicial District, scheduled a hearing in the new courtroom for 18 October 1984, a Thursday. The Dare County Manager wrote Judge Chaffin that the courtroom was reserved that day for hearings by the Employment Security Commission, but that District Court would continue to have exclusive use of the building on Tuesdays and Fridays, and any other day which was reserved far enough in advance. In response Judge Chaffin issued a mandatory injunction on 29 October 1984 requiring the Board of County Commissioners and the County Manager of Dare County to "provide adequate court facilities to the District Court . . . and make available at all times such facilities to the court and recognize the priority that the court has to such facilities" This order was issued without notice to the Commissioners or County Manager, without a hearing and on Judge Chaffin's own initiative.

The Commissioners and County Manager gave notice of appeal and filed a motion to stay further proceedings on the order pending disposition of the appeal. The motion to stay was denied by Judge Chaffin. Facing possible civil contempt charges, the Commissioners and County Manager appealed to this Court to vacate Judge Chaffin's order.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker by John N. Fountain and Gary K. Joyner; Dwight H. Wheless for appellants.

Attorney General Lacy Thornburg by Senior Deputy Attorney General William W. Melvin and Special Deputy Attorney General Reginald L. Watkins for appellee.

PARKER, Judge.

Appellants contend, and the State concedes, that Judge Chaffin's order was entered without following necessary procedural requirements for jurisdiction and due process. Specifically, the injunctive order was not issued incident to any pending action. No complaint was filed and no summons was issued. Therefore, the court did not have jurisdiction to issue an injunction. *Swindell v. Overton*, 62 N.C. App. 160, 302 S.E. 2d 841 (1983), *rev'd on other*

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grounds, 310 N.C. 707, 314 S.E. 2d 512 (1984). Further, the order was issued *ex mero motu* with no notice or opportunity to be heard given to Appellants. The order is void and is, therefore, vacated.

Chief Judge HEDRICK and Judge BECTON concur.

WILLIAM M. EVANS AND WIFE, HILDA G. EVANS v. VESTER MITCHELL

No. 8425SC1058

(Filed 29 October 1985)

Limitation of Actions § 4.2; Negligence § 2— negligent construction of house— statute of repose

Plaintiffs have a cause of action for negligence against the builder of a house even though they were not the original purchasers of the house. However, their claim was barred by the six-year statute of repose of G.S. 1-50(5) where plaintiffs alleged that defendant built and sold the house in 1972 and their action was filed in 1982.

ON reconsideration pursuant to the 19 September 1985 Order of the Supreme Court of North Carolina directing that this cause be reviewed in light of its decision in *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E. 2d 222 (1985). Originally heard in the Court of Appeals 9 May 1985.

The plaintiffs, William and Hilda Evans, brought suit against the defendant, Vester Mitchell, to recover damages for the faulty construction of their home. Their complaint stated three theories of recovery: implied warranty, fraud and deceptive practices in violation of G.S. Ch. 75, and negligence. On 16 September 1982, the plaintiffs filed a complaint in which they alleged *inter alia* that in October 1972 the defendant negligently constructed and placed into commerce a dwelling which the plaintiffs subsequently purchased. The plaintiffs further alleged the defendant's negligent construction caused the plaintiffs' house to crack and crumble. After a trial on the matter, the trial court allowed defendant's motion for directed verdict as to the first two of these issues, but allowed the issue of negligence to be decided by the jury. The jury found the defendant was negligent in the construction of the house and awarded plaintiffs \$10,000 in damages.

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From judgment entered on the verdict, defendant appealed. On 21 May 1985, this Court filed an opinion reversing the judgment. This decision was based upon *Oates v. JAG, Inc.*, 66 N.C. App. 244, 311 S.E. 2d 369 (1984), in which this Court had held that a subsequent purchaser of a house, once removed from the original vendee, could not maintain an action against the original builder for negligent construction of the house. On 13 August 1985, the Supreme Court reversed this decision and held that a subsequent purchaser could recover from the builder. The decision also established that these actions are governed by the time limitations set forth in G.S. 1-50(5). On 19 September 1985 the Supreme Court remanded this cause of action for reconsideration in light of the *Oates* decision.

McMurray & McMurray, by John H. McMurray, for defendant appellant.

Sowers, Avery & Crosswhite, by William E. Crosswhite, for plaintiff appellees.

ARNOLD, Judge.

Defendant contends the trial court erred by denying his motion for directed verdict as to the plaintiffs' negligence claim. We agree.

The plaintiffs have a cause of action for negligence against the builder even though they were not the original purchasers of the house. *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E. 2d 222 (1985). However, the plaintiffs' complaint reveals, on its face, another bar to recovery. G.S. 1-50(5) in pertinent part provides that "[n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specified last act or omission of the defendant . . . or substantial completion of the improvement." In their complaint plaintiffs allege that the defendant built and sold the house in October 1972. This action was not filed until September of 1982. Thus, the action is barred by G.S. 1-50(5). Therefore, the judgment must be and hereby is

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Reversed.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. EDWARD JAMES O'NEAL

No. 8416SC1311

(Filed 5 November 1985)

1. Criminal Law § 164— sufficiency of evidence—no motion for dismissal—considered under App. Rule 2

The sufficiency of the evidence to support charges of felonious breaking or entering and felonious burning of a building was not reviewed pursuant to G.S. 15A-1227(d) and G.S. 15A-1446(d)(5) because defendant failed to preserve any assignments of error for review under the requirements of App. Rule 10(b); the North Carolina Supreme Court has unequivocally stated that the Rules of Appellate Procedure should control where there have been conflicts between subsections of G.S. 15A-1446 and Rule 10. However, the Court of Appeals considered the appeal under Rule 2 of the Rules of Appellate Procedure.

2. Burglary and Unlawful Breakings § 5.1; Arson § 4.1— breaking or entering and burning—evidence of identity—sufficient

The evidence of defendant's identity was sufficient in a prosecution for felonious breaking or entering and felonious burning of a medical center where defendant's long relationship with the health director of the center had deteriorated, leading to arguments that involved profane and threatening language by defendant; defendant lived in the general area; defendant was very familiar with the type of smoke grenades used in the building; a smoke grenade was found near defendant in the vehicle he was occupying at the time of his arrest; defendant suffered a cut to his hand around 11 October 1983 and blood of defendant's type was found on the broken glass at the scene of the crime on 11 October 1983; after each smoke grenade incident and during the time the damage was being cleaned, defendant called the director of the center at her office to ask how things were going; and defendant said, "[h]ey, you know I did all this stuff," when the director confronted him.

3. Burglary and Unlawful Breakings § 6.4— breaking or entering—evidence sufficient

The evidence was sufficient to convict defendant of breaking or entering with the intent to commit a felony where the evidence clearly showed that a window was broken on each of the three occasions, and that smoke grenades were placed on the windowsill inside the window, a chair just inside the window, and on the floor about one foot from the window. G.S. 14-54(a).

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4. Burglary and Unlawful Breakings § 6.2; Arson and Other Burnings § 4.2— felonious breaking and entering with intent to burn the building—evidence of intent to burn the building insufficient

There was insufficient evidence to permit the jury to find beyond a reasonable doubt that defendant intended to burn a building at the time he broke or entered it where the evidence showed at best a vicious pattern of conduct with intent to harass a health director who worked in the building, the evidence was substantial and uncontradicted that defendant had twenty and one-half years of extensive military training and experience with the use and effect of smoke grenades, and that the type of smoke grenades used in this case was not a true pyrotechnic in that it did not produce a flame and was not used for incendiary purposes. However, by finding defendant guilty of felonious breaking or entering, the jury necessarily found facts that would support defendant's convictions for non-felonious breaking or entering.

APPEAL by defendant from *Johnson, E. Lynn, Judge*. Judgment entered 5 April 1984 in Superior Court, ROBESON County. Heard in the Court of Appeals 30 August 1985.

Defendant was tried on indictments proper in form charging him with (1) three counts of felonious breaking or entering a building with the intent to commit a felony therein, to wit: the burning of the building, and (2) three counts of felonious burning of a building. At the close of all the evidence, the court dismissed one count of felonious burning of a building. The jury found defendant guilty of the three counts of felonious breaking or entering a building with the intent to commit the felony of burning a building and not guilty of the two counts of felonious burning of a building. From a judgment consolidating the offenses and the imposition of a five (5) year suspended sentence, defendant appeals.

Attorney General Lacy Thornburg, by Special Deputy Attorney General James C. Gulick, for the State.

William B. Crumpler, for defendant appellant.

JOHNSON, Judge.

At trial defendant waived his right to counsel and proceeded *pro se*. Evidence for the State tended to show the following:

Carolyn Emmanuel was employed as Health Director of the Lumbee Medical Center in Pembroke, North Carolina. Ms. Emmanuel and defendant had a dating relationship from 1976 until January 1982 when the relationship took a turn for the worse,

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leading to arguments that involved some profane and threatening language by defendant. On 11 October 1983, someone broke a window at the Lumbee Medical Center and placed a smoke grenade on the inside windowsill of Ms. Emmanuel's office. The smoke grenade caused extensive smoke damage and charred the windowsill. Blood of the same type as defendant's blood was found on the glass broken from the window. Evidence further tended to show defendant suffered cuts on his hand on or about 11 October 1983. On 24 October 1983, another window at the Center was broken and a smoke grenade was found in a chair in the waiting room. The seat of the chair was burned and considerable smoke damage was done. Again, on 4 November 1983, another window in Ms. Emmanuel's office was broken and a smoke grenade was found on the floor about one foot from the window. A five to eight inch hole was burned in the carpet and again considerable smoke damage incurred. A smoke grenade was also tossed in Ms. Emmanuel's driveway around this same time period. Each time a smoke grenade was found in the Center, defendant called Ms. Emmanuel at the Center while the damage was being cleaned to ask her how things were going.

In December 1983, defendant was observed cutting the tires on Ms. Emmanuel's vehicle while it was parked at the Center. On 8 December 1983, when defendant was arrested, a smoke grenade was found near defendant in the vehicle he was occupying. In late December 1983, when Ms. Emmanuel confronted defendant about the various incidents of property damage, defendant stated, "Hey, you know I did this stuff." Defendant also told her that he was the one who vandalized her automobile and apartment in 1981.

The State's evidence further tended to show that defendant was extremely familiar with smoke grenades, having used them extensively during his twenty and one-half years in the military; that although the smoke grenade produces extreme heat it is not a true pyrotechnic in that it is not a flame producing device, nor used for incendiary purposes.

Defendant's evidence tended to show that he was at home or visiting friends when the incidents were alleged to have occurred; he had no involvement in the acts; he cut his hand while working on a car; that the smoke grenade found in the car when he was arrested belonged to his brother; and that he told Ms. Emmanuel that he committed the acts so she would leave him alone.

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[1] By this appeal defendant seeks to challenge the sufficiency of the evidence used to prove the crimes charged. In order for a defendant to challenge on appeal the sufficiency of the evidence, the defendant must comply with the requirements of Rule 10(b)(3) of the Rules of Appellate Procedure, which provides in pertinent part that:

A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial.

Defendant concedes that he failed to preserve any assignments of error for review pursuant to the requirements of Rule 10(b). However, defendant contends he may challenge the sufficiency of the evidence under the provisions of G.S. 15A-1227(d) and G.S. 15A-1446(d)(5). G.S. 15A-1227(d) provides in pertinent part that "[t]he sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial." G.S. 15A-1446(d)(5) states in pertinent part that errors based upon the ground that the evidence was insufficient as a matter of law may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. We hold that our review in this case is expressly limited by the Rules of Appellate Procedure.

The North Carolina Constitution grants our Supreme Court the *exclusive* authority to make rules of practice and procedure for the Appellate Division. N.C. Const. Art. IV, sec. 13(2). Pursuant to said constitutional authority our Supreme Court promulgated the Appellate Rules of Procedure. See *State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981).

Where there have been conflicts between subsections of G.S. 15A-1446 and Rule 10, the North Carolina Supreme Court has unequivocally stated that the Rules of Appellate Procedure should control. *Elam*, *supra*, at 160, 273 S.E. 2d at 664. In *Elam*, the Court upheld this Court's refusal to review defendant's assignments of error raised pursuant to G.S. 15A-1446(d)(6), because "[t]he General Assembly was without authority to enact G.S. 15A-1446(d)(6). It violates our Constitution." *Id.* Consistent with our position upheld by the Supreme Court in *Elam*, we decline in this case to review the sufficiency of the evidence pursuant to G.S.

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15A-1227(d) and 15A-1446(d)(5) as urged by defendant. However, we have chosen to consider the appeal on its merits pursuant to Rule 2 of the Rules of Appellate Procedure.

In judging the sufficiency of the evidence in a criminal case the test is whether considering the evidence in the light most favorable to the State, there is substantial evidence of all material elements of the offense from which a jury might reasonably find defendant guilty beyond a reasonable doubt. *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981).

Defendant argues that the evidence is insufficient (1) to identify him as the perpetrator of the offenses charged, (2) to establish a breaking or entering as a matter of law, and (3) to show an intent to burn the building.

[2] Evidence which merely discloses motive and opportunity for defendant to have committed the offense charged is insufficient to take to the jury the question of the defendant's identity as the perpetrator of the crime charged. *State v. Jones*, 215 N.C. 660, 2 S.E. 2d 867 (1939). However, evidence of motive and an opportunity, together with other incriminating circumstances, may be sufficient to take the case to the jury, although each single circumstance, when standing alone, is insufficient. *State v. Moses*, 207 N.C. 139, 176 S.E. 267 (1934); *State v. Smith*, 34 N.C. App. 671, 239 S.E. 2d 610 (1977), *disc. rev. denied*, 294 N.C. 186, 241 S.E. 2d 73 (1978).

In the case *sub judice*, the following evidence taken as a whole is sufficient to establish defendant's identity as the perpetrator of the crimes charged: Defendant's long relationship with Ms. Emmanuel had turned for the worse, leading to arguments that involved profane and threatening language by defendant; defendant lived in the general area; defendant was very familiar with the type of smoke grenades used; a smoke grenade was found near defendant in the vehicle he was occupying at the time of his arrest; defendant suffered a cut to his hand around 11 October 1983 and blood of defendant's type was found on broken glass at the scene of the crime on 11 October 1983; after each smoke grenade incident and during the time the damage was being cleaned, defendant called Ms. Emmanuel at the office to ask her how things were going; and defendant's admission to Ms. Em-

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manuel, "[h]ey, you know I did all this stuff," when Ms. Emmanuel confronted him.

We believe this evidence, taken as a whole, constitutes substantial evidence from which a jury might reasonably find beyond a reasonable doubt that defendant was the perpetrator.

[3] To convict a defendant of violation of G.S. 14-54(a), it is sufficient if the State's evidence shows either a breaking *or* an entering; it need not show both. *State v. Barnette*, 41 N.C. App. 171, 254 S.E. 2d 199 (1979). The breaking of a store window, with the requisite intent to commit a felony therein, constitutes a breaking and completes the offense under G.S. 14-54(a) even if defendant never physically enters the building. *State v. Jones*, 272 N.C. 108, 157 S.E. 2d 610 (1967). Entering one's arm through a tear in a screen constitutes an entry. *State v. Yarborough*, 55 N.C. App. 52, 284 S.E. 2d 550 (1981).

Here, the evidence clearly shows that a window was broken on each occasion, thus constituting a breaking each time. *State v. Jones, supra*. Evidence that one smoke grenade was placed on the windowsill inside the window, one found in a chair just inside the window and one found on the floor on another occasion about one foot from the window is substantial evidence from which a jury might reasonably find that defendant inserted his hand through the broken window to deposit each smoke grenade. Again, it is sufficient if the State's evidence shows either a breaking *or* entering. *State v. Barnette, supra*. We find no merit to this assigned error.

[4] By his final argument, defendant contends that the evidence is insufficient as a matter of law to prove felonious intent to burn the building. We agree.

To support a verdict of guilty of felonious breaking or entering a building with the intent to commit the felony therein of burning the building, there must be evidence from which the jury could find that at the time defendant broke or entered the building, he did so with the intent to commit a felony therein, to wit: to burn the building. The intent alleged must be the intent proved. *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965).

Considering all of the evidence in the case *sub judice*, relative to the question of intent, the evidence shows, at best, a

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vicious pattern of conduct with the intent to harass Ms. Emmanuel and not an intent to burn the building. The evidence is substantial and uncontradicted that defendant has had twenty and one-half years of extensive military training and experience with the use and effect of smoke grenades and that the type of smoke grenade used in this case is not a true pyrotechnic in that it is not a flame producing device, nor used for incendiary purposes. The evidence of defendant's conduct is insufficient to permit the jury to find beyond a reasonable doubt that defendant intended to burn the building at the time he broke or entered it. Defendant's convictions for felonious breaking or entering a building must be vacated.

Misdemeanor breaking or entering, G.S. 14-54(b), is a lesser included offense of felonious breaking or entering and requires only proof of wrongful breaking or entry into any building. *State v. Dickens*, 272 N.C. 515, 158 S.E. 2d 614 (1968); *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *affirmed*, 308 N.C. 804 (1983). By finding defendant guilty of felonious breaking or entering, the jury necessarily found facts that would support defendant's convictions of non-felonious breaking or entering. Thus, we remand the case for sentencing for non-felonious breaking or entering. See *State v. Rushing*, *supra*.

Judgment vacated.

Remanded for entry of appropriate judgment.

Judges EAGLES and PARKER concur.

HILDA GIBBS v. DEPARTMENT OF HUMAN RESOURCES

No. 8510SC109

(Filed 5 November 1985)

1. Public Officers § 12— State employee—meaning of reduced in position

A State employee has been reduced in position within the meaning of G.S. 126-35 when the employee is placed in a lower pay grade and not when the employee has been given fewer responsibilities after a department or staff reorganization. Since the employee in this case was not reduced in position, a finding of just cause was not required.

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2. Public Officers § 12— State Personnel Commission—decision on record after hearing officer resigned

Pursuant to 25 N.C.A.C. 1B.0339, the chief hearing officer of the State Personnel Commission could properly render a decision based on the record when the hearing officer who had heard the testimony resigned before rendering a decision where the demeanor of the witnesses was not a factor in the decision.

APPEAL by petitioner from *Barnette, Judge*. Order entered 7 September 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 18 September 1985.

Petitioner, a State employee covered by the State Personnel Act, filed an appeal with the State Personnel Commission in which she alleged that she had been demoted without just cause in violation of G.S. 126-35. The chief hearing officer of the State Personnel Commission, after reviewing the transcript of testimony and arguments and making findings of fact, ruled that she had not been demoted; thus, a finding of just cause was not required. She appealed to the State Personnel Commission, which adopted and affirmed the decision of the chief hearing officer. Petitioner then filed a petition for judicial review in Wake County Superior Court. From an order affirming the decision of the State Personnel Commission, petitioner appealed to this Court.

David M. Rouse, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Ann Reed, for the respondent appellee.

JOHNSON, Judge.

Two issues are presented by this appeal: (1) whether a finding of just cause was required; and (2) whether the chief hearing officer properly rendered a decision even though he did not hear the testimony, the hearing officer who heard the testimony having resigned before rendering a decision.

[1] The first issue we address is whether a finding of just cause was required in this case. G.S. 126-35 provides in pertinent part:

No permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with

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a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.

Thus, according to the plain language of G.S. 126-35, a finding of just cause is not required unless the employee is discharged, suspended, or reduced in pay or position. The question to be resolved in the present case is whether petitioner was reduced in pay or position. If so, a finding of just cause was required and the matter must be remanded for such finding.

Petitioner did not except to the Commission's findings of fact or to the trial court's finding that these findings were supported by competent evidence. These findings are therefore binding. *Horton v. Redevelopment Commission*, 262 N.C. 306, 137 S.E. 2d 115 (1964). The findings of fact show the following:

Petitioner is a permanent state employee employed by respondent at Caswell Center (Center) in Kinston. She had been employed at the Center since July 1968. Prior to 2 June 1980, petitioner was Director of Community Services, having served in this capacity since 1 March 1976. As Director of Community Services, petitioner was a member of the Executive Committee, a group of top managerial employees who reported directly to the Center director. Petitioner supervised numerous employees and was responsible for several program areas.

The classification system title for petitioner's position was "Mental Health Unit Administrator III" at paygrade 72-T. The "T" designation referred to the fact that this was a temporary, rather than a permanent, assignment to this classification and paygrade. In 1978 and 1979, the Office of State Personnel and the respondent's classification personnel conducted a statewide study of all "outreach" positions in order to establish permanent job classifications, specifications and paygrades. Petitioner's position was included in this study.

In July 1979, Dr. Eric Zaharia became Center Director. In November 1979, Dr. Zaharia and petitioner began the "Work Planning and Performance Review" process mandated by State personnel policy. This process involved the setting of goals and objectives for petitioner to attempt to achieve.

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In March 1980, Dr. Zaharia negotiated with the Office of State Personnel and respondent's classification staff to "reallocate" petitioner's position from Mental Health Unit Administrator III to Outreach Specialist II with the understanding that petitioner's position would be redesigned to fit that class, Outreach Specialist, and to be organizationally sound within the Community Services Department. Dr. Zaharia also arranged for the establishment of a new Community Services Director position, which was in the Outreach Director class and at a higher paygrade than the Mental Health Unit Administrator III position petitioner had held as Community Services Director.

On 18 April 1980, petitioner and Dr. Zaharia met to discuss her progress in the Work Planning and Performance Review process. Dr. Zaharia expressed satisfaction with petitioner's progress in half of the areas and dissatisfaction with her progress in others. At this meeting Dr. Zaharia informed petitioner of the results of the classification study. Dr. Zaharia informed petitioner that her position was being reallocated to the Community Outreach Specialist class, and that her paygrade and salary would remain the same. Her new position would be Coordinator of Client Services, a position which previously had existed but had not been utilized.

The next week, Dr. Zaharia informed petitioner that the Community Services Director job, which had been reallocated to the Outreach Director class at a higher paygrade, remained open and that he would examine her performance over the next few months to determine whether or not to promote her into this position. During the week of 26 May 1980, Dr. Zaharia decided not to promote petitioner into this position, but selected another employee to fill the Community Services Director job. He informed petitioner of his decision on 30 May 1980.

After her reallocation to Coordinator of Client Services, petitioner had fewer responsibilities and fewer employees to supervise. She also reported to the Community Services Director rather than to the Center Director.

The Commission further found as facts that a "reallocation" is "the movement of an established position from one class to another, as the result of a classwide study or a review of that position" and that petitioner's position had been reallocated

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laterally in that both positions were at paygrade 72. It concluded that petitioner had not been reduced in pay or position because (1) G.S. 126-35 deals with demotion in a disciplinary context, and it was clear that petitioner's reallocation was not a disciplinary action but resulted from a classification study and Dr. Zaharia's evaluation of petitioner's leadership abilities; and (2) petitioner's salary and paygrade remained the same. Since petitioner was not reduced in pay or position, it concluded a finding of just cause was not required. We agree with the Commission and hold its conclusions of law were correct and supported by the findings of fact.

The State Personnel Commission is required under G.S. 126-4(1) to establish policies and rules governing a position classification plan which provides for the classification and reclassification of all positions subject to the State Personnel Act according to the duties and responsibilities of each position. These policies and rules are contained in the State Personnel Manual.

A "position" is defined in the State Personnel Manual as "[a] group of duties and responsibilities to be performed by one individual. . . ." 25 N.C.A.C. 1F.0104(1). A "class" is defined in the Manual as "[a] specific group of positions which are so similar in duties and responsibilities that they justify common treatment in selection, compensation and other employment processes and the same descriptive title may be used to designate all positions or jobs in the class. . . ." 25 N.C.A.C. 1F.0104(2). Each class is assigned a paygrade on the State of North Carolina Salary Scale. Each paygrade consists of nine steps, each step representing an approximate 5% increase in salary. The paygrades are numbered from 50 to 96. The higher the number of the paygrade, the higher the hiring salary.

We observe from the State Salary Schedule that the salary at the higher steps of the lower paygrades are equivalent to or equal to the hiring rate or lower steps of higher paygrades. Hence, one's paygrade could be lowered but one's salary could remain the same.

Petitioner argues that because she has fewer responsibilities, she has been reduced in position and therefore a finding of just cause was required. To adopt such an interpretation of the statute, however, would severely hamper and hinder managerial

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decisions. Anytime there was a reorganization in a department or staff, a person who had fewer responsibilities after the reorganization could claim a reduction of position and delay such reorganization. We do not believe the General Assembly intended such a result. We therefore hold that one has been reduced in position within the meaning of G.S. 126-35 when an employee is placed in a lower paygrade. The findings of fact clearly establish that petitioner remained at the same paygrade. Since she was not reduced in position, a finding of just cause was not required.

[2] The remaining issue is whether the chief hearing officer properly rendered a decision without having heard any testimony, the hearing officer who heard the testimony having resigned before rendering a decision. The rules of the Commission provide that the person conducting the hearing shall prepare a proposed decision unless such person becomes unavailable, in which event a person who has read the record may prepare the decision "unless the demeanor of witnesses is a factor." 25 N.C.A.C. 1B.0339. Here, the demeanor of the witnesses was not a factor in determining whether petitioner was reduced in pay or position. The chief hearing officer therefore properly rendered a decision based upon the record.

For the foregoing reasons, the order appealed from is

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. LAMONT NEIL CARRUTHERS

No. 8521SC1320

(Filed 5 November 1985)

1. Criminal Law §§ 75.1, 76.7— confession—not coerced—findings regarding police promises and defendant's request for an attorney supported by evidence

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and felonious breaking or entering with intent to commit larceny by denying defendant's motion to suppress his inculpatory statement on the grounds that it was involuntary and coerced where the evidence was uncontradicted that defendant was handcuffed

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the entire time he was in police custody but was not handcuffed to a chair the entire time, defendant testified that he was offered food and was allowed to get water, and defendant accompanied officers to the scene of the crime. Although there was conflicting evidence as to whether defendant and his roommate were promised protection and as to whether defendant requested an attorney during the interrogation, the court's findings that no promises by officers induced defendant to make his statement and that defendant changed his mind and said he wanted to talk on his own initiative after asking for an attorney were supported by competent evidence in the record.

2. Criminal Law § 114.4— felonious assault and felonious breaking or entering—misstatement of the evidence in jury instruction—prejudicial expression of opinion

Defendant was entitled to a new trial on the breaking and entering charge in a prosecution for assault with a deadly weapon and felonious breaking or entering where the trial court impermissibly expressed an opinion and stated a material fact not in evidence during the jury instruction in that the court stated that defendant waited in some pine trees while his companions threw bricks through a window of a school; defendant's statements were only that he heard glass breaking; and the evidence of defendant's guilt was not overwhelming.

3. Criminal Law § 138— assault with a deadly weapon inflicting serious injury—sentence exceeding presumptive term—no error

The trial court did not err in sentencing a defendant convicted of assault with a deadly weapon inflicting serious injury to a term of five years, rather than the presumptive term of three years, where the court found that the one aggravating factor of prior convictions outweighed the one mitigating factor of a minor role in the commission of the offense. In view of evidence that defendant had at least three convictions of felonious larceny and two convictions of felonious breaking or entering, there was no abuse of discretion.

APPEAL by defendant from *Freeman, Judge*. Judgments entered 1 August 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 30 August 1985.

Defendant was charged in bills of indictment with assault with a deadly weapon with intent to kill inflicting serious injury and with felonious breaking or entering with intent to commit larceny. He was found guilty of assault with a deadly weapon inflicting serious injury and felonious breaking or entering. From judgments imposing sentences of five years for the assault conviction and ten years for the breaking or entering conviction, defendant appeals.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General Wilson Hayman, for the State.

A. Carl Penney, for defendant appellant.

JOHNSON, Judge.

The State presented evidence tending to show that a Winston-Salem police officer, while on patrol, noticed a broken window in Mt. Tabor School. He drove his vehicle up to the school, got out, examined the window and saw two bricks on the floor inside of the window. As he was preparing to report by radio, he heard a noise behind him. He turned around and saw a man pointing a gun at him. The policeman threw up his arm, hitting the gun, and the gun discharged, striking the officer's arm. The man with the gun then ran. The officer gave chase and saw the gunman go around a building. The next thing he heard was a car start up and drive away. He never saw the gunman again. Other officers arrived and found three loose bricks inside of the broken window, which was approximately six feet high, two to two and one half feet wide, and two feet off of the ground. Nothing was discovered missing from the school.

Defendant gave a statement in which he stated he received a call from Floyd Walters stating that he "had a job lined up." He met Walters at a corner and got in the car with Walters. Two other people were in the automobile. They drove to Mt. Tabor School where Walters parked the car near some pine trees. The four of them got out of the car and walked toward the school. Walters had a gun in his pocket and two others were carrying a bag. Defendant remained in the pines and served as a lookout. A short time later, defendant heard glass breaking. About 15 to 20 minutes later, he saw a car pulling up and he warned the others. As he was returning to the car, he heard a shot. He dove into the car, followed by two of the other men. Walters returned last.

Defendant also took law enforcement officers out to the scene and retraced his steps on the evening of the incident, pointing out where they parked the car, where he stood as a lookout, the directions the others walked, the direction from which the intruding police car came and where it parked.

The State also presented evidence that defendant had served the police as an informant, and had told police that Walters would

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be breaking into another school two nights previous to the present incident. The police staked out this school that evening but no break-in ever occurred.

Defendant recanted his confession at trial. He testified that he gave the confession because of police coercion and that he had obtained the information he had given the officers from news reports.

[1] Defendant first contends that the court erred in denying his motion to suppress his inculpatory statement because it was involuntary and coerced through prolonged physical restraint and detention, psychological ploys, threats or promises, and was obtained after denial of counsel. He contends that there was evidence that he was handcuffed to a chair or with his hands behind his back for more than five hours, that he was promised protection for himself and his roommate from retaliation from people whom defendant might incriminate, and that defendant requested an attorney during the interrogation.

In order for prolonged questioning or restraint to amount to coercion rendering a confession involuntary, there must be a showing that the defendant was subjected to deprivation or abuse in the course of questioning. *State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986, 64 L.Ed. 2d 844, 100 S.Ct. 2971 (1980); *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982). Such a showing is absent in the present case. Defendant himself testified that he was offered food and was allowed to get some water. While the evidence is uncontradicted that defendant was handcuffed the entire time he was in police custody, he was not handcuffed to a chair the entire time. Not only was he allowed to get water, he accompanied the officers by automobile to the scene of the crime. The mere fact that he was handcuffed does not constitute abuse. There is no evidence that defendant was subjected to relentless questioning or bullying by the police.

The evidence in the present case is conflicting as to whether defendant and his roommate were promised protection and as to whether defendant requested an attorney during the interrogation. When there is a material conflict in the evidence at a voir dire hearing upon a motion to suppress an inculpatory statement, the court must make findings of fact to resolve the conflict. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). The court

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resolved the conflicts in the present case by finding that no promises, offers of reward or inducements were made by any law enforcement officer to induce defendant to make any statement. It also found that defendant initially stated that he did not want an attorney and he did not want to talk. Later, however, as the officers were leaving, defendant, on his own initiative changed his mind and said he did want to talk. We have reviewed the record and find these findings are supported by competent evidence in the record. They are therefore conclusive. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). The motion to suppress was properly denied.

[2] The next contention we address is defendant's contention that the court misstated the evidence and impermissibly expressed an opinion when in its summarization of the evidence, it stated that the State's evidence tended to show that:

the defendant, Lamont Carruthers, waited up in some pine trees where he could see all the entrances to the school *while the other three defendants went down to the school and threw bricks through the window and broke the window open* and that shortly after they had thrown the bricks through the window, the defendant observed Officer R. G. White's police car coming onto the school ground. (Emphasis added.)

Defendant objected to the court's instruction at trial on the ground that there was no evidence that defendant's companions threw bricks through the window. The court refused to correct its instruction.

In *State v. Bertha*, 4 N.C. App. 422, 167 S.E. 2d 33 (1969), the defendants were charged with the breaking and entering of a lady's apartment and the larceny therefrom of, *inter alia*, a television set and an electric fan. A neighbor testified that she saw the defendants crouched in some shrubbery behind the lady's apartment holding a television and fan, and saw them walking toward an abandoned house, where the victim subsequently found the stolen items. The court instructed the jury that the neighbor saw the defendants with "this television set" and saw them take it to the abandoned house. This Court held that the trial court impermissibly expressed an opinion that the television set in the hands

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of defendant was the stolen set by referring to "this" set. The Court noted:

Generally, an inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction, otherwise it is waived. However, an instruction containing a statement of a material fact not shown in evidence must be held prejudicial even though not called to the court's attention at the time. (Citations omitted.)

Id. at 426, 167 S.E. 2d at 35.

Similarly, in *State v. Hardee*, 3 N.C. App. 426, 165 S.E. 2d 43 (1969), the trial court impermissibly expressed an opinion when it assumed in its instructions that defendant fired the fatal shot, although the defendant admitted shooting at the victim and the evidence showed that the victim fell to the ground as the defendant was chasing him and shooting at him, and that the victim died of gunshot wounds in the chest. This Court stated that it was for the jury, not the judge, to say whether defendant fired the fatal shot.

In the present case there is no direct evidence that defendant's companions threw bricks through the window. Defendant only stated in his oral and written statement that he heard glass breaking; he did not see, nor did he say, that his companions threw bricks through the window. While the jury could have inferred from the State's evidence that defendant's companions threw the bricks through the window, this inference was for the jury, not the court, to make. The court, therefore, impermissibly expressed an opinion and stated a material fact not in evidence, it being necessary to prove that persons with whom defendant was acting in concert broke into the school. The evidence of defendant's guilt is not overwhelming. Other than defendant's statement, the State had little or no evidence against defendant. We hold defendant, having brought the error to the trial court's attention and preserved the question for review, is entitled to a new trial on the breaking or entering charge. *State v. Bertha*, *supra*; *State v. Hardee*, *supra*.

In light of this disposition, we need not consider defendant's remaining assignments of error relating to the breaking or entering charge as they may not recur at retrial. We will address two

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of the remaining assignments of error as they relate to the conviction for assault with a deadly weapon inflicting serious injury.

The first of these is that the court erred in denying defendant's motions to dismiss the charges for insufficiency of the evidence. Defendant makes no argument that the evidence was insufficient to support a conviction for assault with a deadly weapon inflicting serious injury. Suffice it to say, the evidence was sufficient to support the conviction.

[3] The other assignment of error is that the court abused its discretion in sentencing defendant to five years for the conviction for assault with a deadly weapon inflicting serious injury, which exceeded the presumptive term of three years. The court found that the one aggravating factor it found, that defendant had prior convictions, outweighed the one mitigating factor it found, that defendant played a minor role in the commission of the offense. In view of the evidence that defendant had at least three convictions of felonious larceny and two convictions of felonious breaking or entering, we find no abuse of discretion.

The results are:

No. 84CRS25100: No error.

No. 84CRS25101: New trial.

Judges EAGLES and PARKER concur.

IN THE MATTER OF: MICHELLE HELMS, DOB: SEPTEMBER 23, 1978, ONSLOW
COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER, MICHAEL
HELMS (FATHER OF MICHELLE HELMS), RESPONDENT

No. 854DC165

(Filed 5 November 1985)

1. Witnesses § 7—refreshing recollection—necessity for foundation

Although the better practice would have been for petitioner to lay a complete foundation in order for a witness to refresh her recollection from a prepared document, the failure to do so did not amount to prejudicial error where counsel for respondent was permitted to inspect the document and was offered the opportunity to cross-examine the witness. G.S. 8C-1, Rule 612(a)(c).

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2. Evidence § 50.2— statements to pediatrician and psychologist—exception to hearsay rule

Statements by a child to a pediatrician and a psychologist concerning abusive acts by her father, made for the purpose of diagnosis and treatment, were admissible under G.S. 8C-1, Rule 803(4), as an exception to the hearsay rule.

3. Parent and Child § 2.2— sexual and physical child abuse

The evidence supported findings by the trial court concerning respondent's sexual and physical abuse of his five-year-old daughter, and the findings supported the court's conclusion that the child was an abused juvenile within the meaning of G.S. 7A-517(1)(a), (c) and (d).

4. Parent and Child § 6.4— unfitness of father for child visitation—sufficiency of evidence

Testimony by a pediatrician and a psychologist concerning respondent's sexual and physical abuse of his five-year-old daughter was sufficient to support the court's conclusion that respondent was not a fit and proper person to have visitation privileges with his daughter and that it was in the best interest of the child to remain in foster care.

APPEAL by respondent from *Henderson, Judge*. Order entered 20 September 1984 in District Court, ONSLOW County. Heard in the Court of Appeals 24 September 1985.

Petitioner, Onslow County Department of Social Services, filed this juvenile petition on 30 July 1984 alleging that Michelle Helms was an abused child as defined in G.S. 7A-517 in that her father, respondent, had sexually and physically abused her. Following evidentiary hearings, the trial court ruled that the minor child was an abused juvenile within the meaning of G.S. 7A-517(1)(a), (c) & (d). The court also terminated respondent's visitation privileges with the child. Respondent appealed from this order.

Cynthia L. McNeill and Edwin H. Blackwell, III, for petitioner appellee.

Popkin and Coxe, by Jeffrey S. Fulk, for respondent appellant.

No brief by guardian ad litem for Michelle Helms.

JOHNSON, Judge.

[1] The first issue we address is whether the court erred in allowing a witness for petitioner to testify from a prepared docu-

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ment. Respondent concedes that North Carolina law permits a witness to refresh his recollection by reviewing a writing or object, but he argues an insufficient foundation was laid to permit the witness to refresh her recollection from the writing because it was not established prior to the use of the writing that the witness could not remember the event, that the writing would refresh her memory, and that after reviewing the document, the witness could then remember the event. Since this action was tried after 1 July 1984, the North Carolina Rules of Evidence govern. 1983 Sess. Laws c. 701 s. 3; G.S. 8C-1 (Cum. Supp. 1981). Rule 612(a) provides that if a witness, while testifying, uses a writing or object to refresh his memory, an adverse party is entitled to have the writing produced. Rule 612(c) further provides that the party entitled to have the writing produced is entitled to inspect the document, cross-examine the witness on the document, and introduce into evidence portions of the document which relate to the witness' testimony. In the present case, when counsel for petitioners sought to refresh the witness' recollection with a written document the witness had prepared, the court, upon respondent's objection to the use of the document, allowed the witness to review the document and then ordered it turned over to counsel for respondent. Counsel for respondent had the opportunity to cross-examine the witness but declined the opportunity. Although the better practice would have been for petitioner to lay a complete foundation, the failure to do so under the circumstances of this case did not amount to prejudicial error.

The next issue is whether the court erred in admitting testimony of witnesses as to statements the five year old child made to them regarding abusive acts by her father when the child did not testify. These statements were made to two babysitters, a social worker, a pediatrician, and a psychologist. Respondent contends these statements were inadmissible hearsay and did not qualify for any of the exceptions to the hearsay rule under Rule 803 or 804.

[2] Petitioner contends that the statements made to the pediatrician and psychologist were admissible under Rule 803(4), which permits the admission of statements made for purposes of medical diagnosis or treatment "and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as rea-

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sonably pertinent to diagnosis or treatment." We agree. In the present case, the pediatrician testified that he examined the child on 30 July 1984 when she was brought in by her babysitters with regard to bruises and abrasions they had observed on the minor child and their concerns that the child had been sexually abused. Thus, any statements made by the child to him for purposes of diagnosis or treatment as to the genesis of her injuries were admissible. Likewise, the statements the child made to the psychologist for purposes of diagnosis or treatment were admissible. Although the child was originally referred to the psychologist for an examination by court order, the psychologist testified that he has had several treatment sessions with the child and that he is continuing to treat the child for her emotional problems.

Petitioner also contends that the statements made to the babysitters and social worker were admissible as excited utterances under Rule 803(2). Respondent argues that the excited utterance exception is inapplicable because the statement was not made "while the declarant was under the stress of excitement caused by the event or condition." The record is not clear as to when the alleged abuses occurred; thus, we cannot determine how long after the alleged abuses the child made the statements. We need not address the issue of whether the statements were made under the stress of excitement, however, because even if we assume the statements were improperly admitted, the remaining evidence supported the court's findings and conclusions that the child was physically and sexually abused. Indeed, the lack of findings of fact by the court with regard to the statements made by the child to the babysitters and social worker indicates that the court disregarded these statements. The trial court's findings of fact were addressed solely to the statements made by the child to the pediatrician and psychologist.

[3] The court made findings of fact, *inter alia*, that the pediatrician examined the child and found extensive, severe bruising over the child's body, and fine red spots on her arm and left chest wall; that tests performed upon the child indicated the child did not have a bleeding disorder which might cause easy bruising; that in taking the child's medical history, the pediatrician learned from the babysitters that the child had told them her father had tickled her in the genital area; that he examined the child's pelvic

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area and found that she had a normal hymen, but that the vaginal opening was abnormally red and tender; that respondent father admitted beating the child on one occasion but denied having sexually molested his child; that the psychologist conducted five or six therapy sessions with the child beginning 15 August 1984; that tests were performed upon the child which indicated that the child was of above average intelligence, but had a lot of stress and resistance in talking about certain subjects, which she called her "secrets"; that the child described digital insertion by her father, saying her father "made [her] bleed with his finger," and pointing to her genital area when asked where she was made to bleed; that she talked about touching her father's "whistle" and about how "white stuff . . . like an egg" came from it; that the child's statements to the psychologist were trustworthy because (a) leading questions were never used and an effort was made by the psychologist to maintain spontaneity, (b) the child originated the term "secret", and when the therapist talked about the "secret", the child's demeanor changed from a verbal, happy child to a guarded, sad child, (c) the child did not tell any secrets until the next to last session, and (d) the child told the therapist she did not like to talk about these things because she was afraid he would not like her and she did not tell her foster mother about these things for fear of rejection; and that the child expressed fear of and anger with her father to the therapist and had adopted the surname of her foster parents, referring to herself as "Michelle Patterson" rather than "Michelle Helms." Respondent did not except to these findings; therefore, these findings are presumed supported by competent evidence and are binding. *Tinkham v. Hall*, 47 N.C. App. 651, 267 S.E. 2d 588 (1980).

Respondent did, however, except to the court's finding of fact that it was the pediatrician's opinion that the child had been sexually abused. He argues that the finding was unsupported by the evidence because the pediatrician testified that his findings as to sexual abuse were inconclusive. We believe this finding was harmless error. The pediatrician testified that his finding as to sexual abuse were inconclusive—he "couldn't rule it in or out." He also testified that the child had an unusual redness and tenderness inside her left labia next to the vagina, which indicated there could have been bleeding to the left of the redness. This testimony was consistent with the child's statements that

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her father had inserted his finger in her genitals causing her to bleed. The court could thus conclude from this evidence and the testimony of the psychologist that respondent sexually abused the child. We hold that the court's conclusion that the child was abused within the meaning of G.S. 7A-517(1)(a), (c) & (d) was supported by the findings of fact, which were supported by the evidence.

[4] The final issue is whether the court's conclusion of law that respondent was not a fit and proper person to have visitation privileges with his minor child was supported by the evidence. Respondent argues that since he had been granted supervised visitation privileges under two previous orders of the court, there should have been a showing of changed circumstances in order to deny him visitation rights. At the time the earlier orders had been entered, however, the court had not heard the testimony of the pediatrician and the psychologist. Their testimony was sufficient to support the court's conclusion that respondent was not a fit and proper person to have visitation privileges with his daughter and that it was in the best interests of the child to remain in foster care.

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RALPH WOODS, JR.

No. 8519SC405

(Filed 5 November 1985)

1. Robbery § 4.3— armed robbery—possession of recently stolen property—acting in concert

The State's evidence was sufficient for the jury to find defendant guilty of armed robbery under the doctrines of possession of recently stolen property and acting in concert where it tended to show that a masked man carrying a gun entered a service station and demanded the money from the cash register; the masked gunman ran behind the counter when a customer drove up to the gas pumps; the station attendant gave the gunman the entire cash register drawer containing approximately \$1,300; a second masked man entered the station wearing a light blue leisure jacket and told the first man that there

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was someone coming; both men fled, and the attendant saw a dark green Buick station wagon leave the service station; the attendant discovered that a revolver which he had kept under the counter and which had contained two bullets was missing; shortly after the robbery, an officer heard a shot fired while he was pursuing a green station wagon; the station wagon was found on a dead end street with the engine running and no one inside; an empty cash register drawer was found in the station wagon; the station wagon was owned by a codefendant who was found early the next morning in a stolen car with \$1,039 in cash; the revolver which had been taken from the service station was found on the person of defendant when he was arrested some nine hours after the robbery; the revolver contained one bullet and one spent shell; at the time of his arrest, defendant was wearing a light blue leisure jacket matching the description of the one worn by one of the robbers; and defendant falsely told the arresting officer that he worked at a nearby mill.

2. Robbery § 6.1 — plea bargain in another case — consecutive sentence required in retrial

Although defendant's plea bargain in a common law robbery case provided that the sentence would run concurrently with the sentence imposed in defendant's first trial for armed robbery, the trial judge at defendant's retrial for armed robbery was required by G.S. 14-87(d) to order defendant's sentence for armed robbery to begin at the expiration of the sentence being served by defendant for common law robbery.

Judge BECTON concurring.

APPEAL by defendant from *Walker, Judge*. Judgments entered 28 November 1984 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 21 October 1985.

Defendant was charged in an indictment, proper in form, with armed robbery. He was also charged with the misdemeanor offense of carrying a concealed weapon. Defendant was tried and found guilty of both offenses. From judgments imposing sentences of fourteen years for the armed robbery and six months for carrying a concealed weapon, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General William F. O'Connell, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Leland Q. Towns, for defendant, appellant.

HEDRICK, Chief Judge.

This case is before this Court on appeal from defendant's second trial; defendant was granted a new trial by our Supreme Court in *State v. Woods*, 311 N.C. 80, 316 S.E. 2d 229 (1984).

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[1] On this appeal, defendant first assigns error to the trial court's denial of his motion to dismiss.

At trial the State presented evidence tending to show the following: Stephen Douglas Dunn was working at a service station in Candor, North Carolina on 22 November 1981. At approximately 9:00 p.m. a masked man, carrying a gun, entered the store and demanded the money from the cash register. A customer drove up to the gas pumps and the masked man panicked and ran behind the counter. Dunn gave him the entire cash register drawer, which contained approximately \$1,300. A second masked man entered the store wearing a light blue leisure jacket and said to the first man, "There is someone coming." Both men fled. Dunn ran outside and saw a dark green Buick station wagon leave the service station. Dunn later noticed that his RG-38 revolver, which he kept under the counter, was missing. He had seen his gun under the counter a minute before the masked men entered the store. The gun had contained two bullets.

Biscoe Police Officer Davis observed a green station wagon at 9:10 p.m. about four miles from the service station. He pursued the vehicle, and heard a shot fired. The car was found on a dead end street with the engine running and no one inside. A search of the car revealed various items of clothing and an empty cash register drawer. The car was owned by Oscar Garcia Gonzales of High Point, North Carolina. Gonzales was found at 4:00 a.m. on 23 November 1981 in a stolen car with \$1,039 in cash.

Police Chief W. L. Batten of the Star Police Department received a call at 6:30 a.m. on 23 November 1981 that a suspicious person was in the Quik Chek store. At the store he observed defendant wearing a blue leisure jacket. Defendant told Batten that he worked in a mill near the traffic light. (There were no mills near the only traffic light in town.) Batten searched defendant, found the RG-38 revolver, and arrested him for carrying a concealed weapon. The gun, which contained one bullet and one spent shell, was identified by Dunn.

Defendant did not present any evidence.

In considering defendant's motion to dismiss the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant

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was the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The evidence, whether circumstantial or direct, must be considered in the light most favorable to the State. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980).

As neither perpetrator was identified by Dunn, the State relied on the doctrine of possession of recently stolen goods to link defendant to the crime. This doctrine holds that the possession of stolen property recently after the theft and without the intervening agency of others, raises an inference that the person in possession of the property is the thief. *State v. Woods, supra*. To invoke the doctrine of possession of recently stolen goods the State must prove beyond a reasonable doubt that (1) the property was stolen; (2) the stolen goods were found in defendant's custody and control, to the exclusion of others; and (3) the possession was recently after the commission of the larceny. *State v. Woods, supra*. In the instant case we find that there was sufficient evidence that the stolen money and gun were found in the possession of Gonzales and defendant shortly after the robbery to invoke this doctrine.

Although defendant was found in possession of the gun, the evidence tends to show that he also stole the cash, under the doctrine of acting in concert. Under this doctrine defendant must be present at the scene of the crime and there must be evidence that defendant was acting together with another who is doing acts necessary to constitute the crime, pursuant to a common plan or purpose to commit the crime. *State v. Woods, supra*; *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). We find that the evidence, viewed in the light most favorable to the State, was sufficient to permit the inference that defendant stole both Dunn's gun and the cash, and, thus, withstands defendant's motion to dismiss. Defendant's assignment of error is overruled.

[2] In his second assignment of error defendant argues that the trial court erred in ordering his sentence to begin at the expiration of a sentence imposed at a previous Davidson County common law robbery case when his plea bargain in that case provided that the sentence would run concurrently with the sentence imposed in defendant's first trial for this offense.

G.S. 14-87(d) provides in pertinent part:

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A person convicted of robbery with firearms or other dangerous weapons shall receive a sentence of at least 14 years in the State's prison. . . . Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

The trial judge was required to order defendant's sentence to begin at the expiration of his current sentence imposed in Davidson County. The judge had no discretion, but was compelled to follow the unambiguous requirement set forth in G.S. 14-87(d). This assignment of error is overruled.

We have carefully considered defendant's assignments of error and find

No error.

Judge BECTON concurs in the result.

Judge PARKER concurs.

Judge BECTON concurring.

In my view, our conclusions regarding the substantive non-suit issue and the procedural sentencing issue are compelled by case law and rules of statutory construction. That the legislature may not have contemplated the unique factual situation presented in this case does not require a remand. The critical language of N.C. Gen. Stat. Sec. 14-87(d) is clear: "Sentences imposed pursuant to this Section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." This language does not allow the construction urged by defendant—"The . . . language, 'any sentence being served' should be construed as referring to any prison sentence or term imposed prior to the original conviction." Nor am I persuaded by defendant's implicit argument that, since his original Montgomery County sentences (twenty years for armed robbery and six months for carrying a concealed weapon) were vacated when he was granted a new trial in *State v. Woods*, 311 N.C. 80, 316 S.E. 2d 299 (1984), there was no "sentence being served" to which the ten-year concurrent Davidson County sentence could at-

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tach. The Davidson County sentence is not before us for review. And we hardly could be expected to vacate that sentence if, for example, our Supreme Court had reversed defendant's Montgomery County convictions instead of merely granting defendant a new trial.

On the other hand, I am troubled that the defendant, who plea-bargained in Davidson County for a ten-year sentence to run concurrently with earlier sentences totalling twenty years and six months in Montgomery County, now finds himself facing sentences totalling twenty-four years as a result of his successful appeal of the Montgomery County convictions. Consequently, I have concurred not to suggest that defendant's ten-year sentence in Davidson County should run concurrently with the fourteen-year sentence imposed at his retrial in Montgomery County, nor to suggest that defendant should get the benefit of his bargain and not be exposed to a total prison term exceeding twenty years and six months. Rather, I concur to point out that the legislature in enacting G.S. Sec. 14-87(d) may not have contemplated the peculiar factual situations presented by this case, and to note, as the State did in its brief, that "additional proceedings in the Davidson County case wherein the plea bargain was apparently made might be the appropriate avenue of relief for any inequity resulting to this defendant."

C. A. CAMPBELL v. EVELYN CONNOR AND HUSBAND, JACK CONNOR, AND
JOHN T. HENDERSON

No. 8522SC103

(Filed 5 November 1985)

1. Rules of Civil Procedure § 50.3— cartway proceeding—motion for a directed verdict denied—requirement for statement of grounds waived

The Court of Appeals elected to waive the requirement that a motion for a directed verdict state specific grounds and considered the sufficiency of the evidence in a cartway proceeding where the petitioner did not raise the omission of the statement of grounds and both parties argued the sufficiency of the evidence in their briefs. G.S. 1A-1, Rule 50(a).

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2. Highways and Cartways § 12— cartway proceeding—burden of proving inadequacy of alternative outlets not met

The trial court erred in denying respondent's motion for a directed verdict in a cartway proceeding where the evidence was sufficient to establish that petitioner was cultivating the land in question; petitioner had a permissive right of way across the land of a neighbor which did not provide adequate ingress and egress; approximately 100 feet of petitioner's land fronted public highway 901 but it was impossible for petitioner to move necessary equipment directly from the highway to his property because of a steep fifteen to twenty-five foot drop from the shoulder of the highway to his land; and a drainage culvert which lay under the highway emptied water onto petitioner's land so that water collected at the bottom of the slope after rain. Petitioner has the burden of proving the inadequacy of alternative outlets and there was no evidence regarding the feasibility of creating direct access from petitioner's land to highway 901. G.S. 1A-1, Rule 50, G.S. 136-69.

3. Rules of Civil Procedure § 50.5— motion for directed verdict erroneously denied—no motion for judgment n.o.v.—new trial

Where the trial court erred by denying respondents' motion for a directed verdict in a cartway proceeding but respondents failed to move for a judgment n.o.v. and the trial court did not on its own motion grant, deny, or redeny respondents' motion for a directed verdict, the Court of Appeals could not direct entry of judgment in accordance with the motion and a new trial was necessary. G.S. 1A-1, Rule 50(b)(2).

Judge PHILLIPS dissenting.

APPEAL by respondents Evelyn and Jack Connor from *Beaty, Judge*. Judgment entered 29 August 1984 in Superior Court, IREDELL County. Heard in the Court of Appeals 17 September 1985.

Petitioner filed a special proceeding pursuant to N.C. Gen. Stat. 136-68, -69, seeking a cartway across respondents' land. He alleged that he was without adequate access to a public road other than through respondents' property. From a judgment entered on a jury verdict in favor of petitioner, respondents appeal.

Pope, McMillan, Gourley & Kutteh, by William H. McMillan, for petitioner appellee.

McElwee, McElwee, Cannon & Warden, by E. Bedford Cannon, for respondent appellants.

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WHICHARD, Judge.

[1] Respondents contend the court erred in denying their motion for a directed verdict made at the close of petitioner's evidence and renewed at the close of all the evidence. A motion for a directed verdict must state the specific grounds therefor. N.C. Gen. Stat. 1A-1, Rule 50(a). The record does not include either a written statement of the grounds for the motion or a transcript of oral arguments made in support of the motion. *See Hensley v. Ramsey*, 283 N.C. 714, 726, 199 S.E. 2d 1, 8 (1973). As petitioner does not raise this omission, however, and both parties argue the sufficiency of the evidence in their briefs, we elect to waive this requirement and reach the merits of respondents' contention. *See Pallet Co. v. Truck Rental, Inc.*, 49 N.C. App. 286, 288-89, 271 S.E. 2d 96, 97 (1980).

[2] The denial of respondents' motion for a directed verdict is error if the evidence, viewed in the light most favorable to petitioner, fails to support each of the elements necessary to prove that petitioner is entitled to a cartway pursuant to N.C. Gen. Stat. 136-69. *See Oshita v. Hill*, 65 N.C. App. 326, 329, 308 S.E. 2d 923, 925-26 (1983); N.C. Gen. Stat. 1A-1, Rule 50. Petitioner is entitled to a cartway upon proof that (1) the land in question is used for one of the purposes enumerated in the statute, (2) the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress, and (3) the granting of a private way over the lands of other persons is necessary, reasonable and just. N.C. Gen. Stat. 136-69; *Taylor v. Paper Co.*, 262 N.C. 452, 456, 137 S.E. 2d 833, 835 (1964). N.C. Gen. Stat. 136-69 infringes on the rights of private property owners and must be strictly construed. *Candler v. Sluder*, 259 N.C. 62, 65, 130 S.E. 2d 1, 4 (1963); *Taylor v. Askew*, 17 N.C. App. 620, 622, 195 S.E. 2d 316, 317-18 (1973). Thus, a proposed cartway may not be approved simply because it is more convenient or less expensive than alternative outlets to a public road available for use by petitioner. *Warlick v. Lowman*, 103 N.C. 122, 124, 9 S.E. 458, 459 (1889) (more convenient); *Taylor*, 17 N.C. App. at 624, 195 S.E. 2d at 319 (less expensive). To obtain a cartway alternative outlets must be shown to be inadequate. *See Garis v. Byrd*, 229 N.C. 343, 49 S.E. 2d 625 (1948).

Viewed in the light most favorable to petitioner, the evidence is sufficient to establish that he is presently cultivating the land

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in question, a use which brings the land within the scope of N.C. Gen. Stat. 136-69. In addition the evidence is sufficient to establish that while petitioner has a permissive right of way across the land of a neighbor, the respondent in this action who did not appeal, that right of way does not provide petitioner with adequate ingress and egress. There is also evidence sufficient to establish that while approximately 100 feet of petitioner's land fronts public highway 901, due to the steep grade of the slope which leads from the highway it is *presently* impossible for petitioner to move necessary equipment directly from highway 901 to his property and from his property to the highway. Petitioner testified that there is a steep fifteen to twenty-five foot drop from the shoulder of the highway to his land. In addition a drainage culvert which lies under the highway empties water onto petitioner's land. As a result water collects at the bottom of the slope after rain.

There is, however, no evidence regarding the feasibility of creating direct access from petitioner's land to highway 901. In *Taylor*, this Court upheld the dismissal of a proceeding to establish a cartway where petitioner's permissive easement could have been made suitable by "'placing tiles in approximately twenty farm drainage ditches . . .'" 17 N.C. App. at 621, 195 S.E. 2d at 317. Regarding the relative costs of improving petitioner's existing permissive easement and constructing an outlet across the land of respondents, the Court stated:

Evidence . . . was in sharp conflict as to the relative costs of constructing a road over the existing spoil bank as compared with the costs of constructing a new cartway to be condemned across respondents' lands. Again, we agree with the trial court that, even if petitioners' evidence in this regard be accepted as true, the conclusion is not thereby compelled that the more expensive road along the spoil bank is not "an adequate means of ingress and egress." Petitioners are not entitled to condemn a cartway across respondents' lands merely because this might prove the least expensive means for obtaining access to their property.

17 N.C. App. at 624, 195 S.E. 2d at 319.

Thus, to demonstrate that an existing outlet to a public road is not adequate the infeasibility of modifying the terrain to create

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access must be shown. Neither petitioner nor respondents introduced evidence regarding the feasibility of making petitioner's direct access to highway 901 suitable.

Petitioner admits the existence of the alternative outlets but asserts he is nonetheless entitled to a cartway because those outlets are inadequate. He has the burden of proving the inadequacy of the alternative outlets, however, *see Paper Co.*, 262 N.C. at 457, 137 S.E. 2d at 837, and he has failed to sustain that burden. He has not shown the unavailability of adequate access from his own land and the consequent necessity of a private way over the lands of other persons. Accordingly, the court erred in denying respondents' motion for a directed verdict.

[3] As respondents failed to move for a judgment notwithstanding the verdict and the trial court did not on its own motion grant, deny, or deny respondents' motion for a directed verdict, this Court "may not direct entry of judgment in accordance with the motion" N.C. Gen. Stat. 1A-1, Rule 50(b)(2); *Hensley*, 283 N.C. at 726-29, 199 S.E. 2d at 8-9. Instead, there must be a new trial. *Britt v. Allen*, 291 N.C. 630, 636-39, 231 S.E. 2d 607, 612-14 (1977); *Hodges v. Hodges*, 37 N.C. App. 459, 470, 246 S.E. 2d 812, 818 (1978). This disposition renders consideration of respondents' other argument unnecessary.

New trial.

Judge WELLS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my view the adequacy of petitioner's access to the highway, and his right to obtain a cartway across respondents' land was properly determined by the jury in a trial free of prejudicial error; and I vote to affirm the judgment.

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VICTORIA ANN KUHLMAN KELLY (NOW DAVIS) v. RANDELL LEE KELLY

No. 8521DC435

(Filed 5 November 1985)

**1. Divorce and Alimony § 23.6— child custody—refusal to decline jurisdiction—
inconvenient forum**

The trial court did not err in refusing to decline to exercise jurisdiction of a proceeding to change child custody under G.S. 50A-7(a) on the ground of inconvenient forum where the child had lived most of her life in North Carolina and had only recently left this state, both parents spent time caring for the child in North Carolina, both sets of grandparents reside in North Carolina, the character of both parents is known in this state, and only the fact that the child and her mother resided in Wisconsin for the nine months immediately preceding the custody modification hearing supported deferring jurisdiction to Wisconsin.

**2. Divorce and Alimony § 24.8— modification of child custody—remarriage—
move to another state—insufficient change of circumstances**

Remarriage of the mother was not a sufficient change of circumstances to justify modification of a child custody order without a finding of fact indicating the effect of remarriage on the child. Nor did a change of residence to another state constitute a substantial change of circumstances without a showing that the move to an unfamiliar place proved disruptive or detrimental to the child's welfare.

3. Divorce and Alimony § 24.8— modification of child custody—birth of illegitimate child—insufficient change of circumstances

The birth of an illegitimate child to the custodial mother did not constitute a sufficient change of circumstances to support an order modifying child custody where the mother has legitimized her new child by marrying the child's father, and the court found that both parents are fit and proper persons to have primary custody.

APPEAL by plaintiff from *Gatto, Judge*. Order modifying award of child custody entered 4 December 1984. Heard in the Court of Appeals 30 October 1985.

This is a civil action wherein Randell Kelly, the father of Elizabeth Gail Kelly, seeks to gain custody of his daughter from her mother, Victoria Kelly.

The trial court made the following findings of fact:

1. The parties were present and ably represented by counsel. The parties were married to each other on August 20, 1976, and to the union of that marriage one child was

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born, namely, ELIZABETH GAIL KELLY, born September 30, 1978, which child is the subject of this proceeding.

2. The parties were residing in the State of Montana at the time of the child's birth. In November, 1979, Plaintiff returned to Forsyth County, North Carolina with the child and on January 8, 1980, the parties entered into a separation agreement whereby the Plaintiff-Mother was given custody of the child. In August, 1980, Defendant was discharged from the U.S. Air Force and returned to Forsyth County, North Carolina.

3. The parties were divorced on April 27, 1981, and the separation agreement, together with its provision for custody to the Plaintiff, was incorporated into the divorce judgment. The minor child has resided with the Plaintiff-Mother since birth, and Plaintiff has had primary care and responsibility since separation. From the date of separation in November, 1979, until March 6, 1984, Plaintiff has resided in Forsyth County.

4. In early 1983, Plaintiff became pregnant with the child of Arvid Eugene Davis, a resident of the State of Wisconsin. That child was born on December 6, 1983, in Forsyth County as CRYSTAL MICHELLE KELLY. On March 6, 1984 Plaintiff moved to the State of Wisconsin together with her infant and the subject child. Defendant filed this proceeding as a Motion in the Cause on April 11, 1984. Plaintiff was married to Arvid Eugene Davis on April 16, 1984, in the State of Wisconsin.

5. Plaintiff's present husband, Davis, is employed with the Minnesota Department of Corrections as a prison guard earning a gross annual salary of approximately \$20,000.00. The Davis residence is in Wisconsin but only a short distance from his Minnesota employment.

6. Since the Order awarding custody to Plaintiff in April, 1981, Defendant-Father has resided in Forsyth County. He is employed with National Linen and earns an annual gross salary of approximately \$22,000.00 and receives \$114.00 per month as VA compensation. He was remarried on February 28, 1983, and lives with his wife and her two (2) minor children of a previous marriage; a daughter age eight (8), and a son age seven (7). She is employed at a cafeteria with working hours from 6:00 AM until 2:00 PM.

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7. Both sets of grandparents as well as other relatives of the subject child reside in Forsyth County, North Carolina.

8. At the time of the entry of the Order awarding custody on April 27, 1981, Plaintiff resided in Forsyth County, was employed here, and had one minor child, namely the subject child. At the present time Plaintiff has given birth to another child, has moved to the State of Wisconsin, and has remarried. She presently lives in a mobile home park in Roberts, Wisconsin. Defendant has also remarried and resides with his current wife and her two (2) minor children in a three (3) bedroom home in Forsyth County.

9. Both parties are devoted to the child and are fit and proper persons to have primary custody.

The child is emotionally and physically normal with no unusual health problems. Both parties are responsible for the maintenance and support of the child, but Plaintiff-Mother is presently unemployed and unable to pay child support at this time.

The trial court concluded that there has been a substantial and material change of circumstances regarding Elizabeth and that her welfare would be best promoted by awarding her primary physical custody to her father.

From the order granting custody to the defendant father, plaintiff mother appealed.

House, Blanco & Osborn, P.A., by Reginald F. Combs and Gene B. Tarr, for plaintiff, appellant.

Liner & Bynum, by David V. Liner, for defendant, appellee.

HEDRICK, Chief Judge.

[1] Appellant, Mrs. Kelly, admits that the trial court had jurisdiction in this case pursuant to G.S. 50A-3(a), but she contends that the trial court erred by failing to decline jurisdiction pursuant to G.S. 50A-7(a).

G.S. 50A-7 in pertinent part provides:

(a) A court which has jurisdiction under this Chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination un-

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der the circumstances of the case and that a court of another state is a more appropriate forum.

. . .

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) If another state is or recently was the child's home state;

(2) If another state has a closer connection with the child and the child's family or with the child and one or more of the contestants;

(3) If substantial evidence relevant to the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) If the parties have agreed on another forum which is no less appropriate; and

(5) If the exercise of jurisdiction by a court of this State would contravene any of the purposes stated in G.S. 50A-1.

In determining that the best interest of the child supported North Carolina jurisdiction, the court had before it evidence that Elizabeth lived most of her life in North Carolina, she only recently left North Carolina, both parents spent time caring for Elizabeth in North Carolina, both sets of grandparents reside in North Carolina, and the character of both parents is known in North Carolina. The only other state which might logically take jurisdiction over this matter is Wisconsin. Only the fact that Elizabeth and her mother resided in Wisconsin for the nine months immediately preceding the custody modification order at issue supports deferring jurisdiction to Wisconsin.

Deferring jurisdiction on inconvenient forum grounds rests in the sound discretion of the trial judge. Without a showing that the best interest of the child would be served if another state assumed jurisdiction, North Carolina courts should not defer jurisdiction pursuant to G.S. 50A-7. We hold that the trial court did not err in exercising jurisdiction.

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Mrs. Kelly also contends that the trial court made no findings of fact which support the court's conclusion that there has been a substantial and material change of circumstances as regards Elizabeth's welfare. It is well established that a modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change in circumstances affecting the welfare of the child, and the party moving for such a modification has the burden of showing such change of circumstances. *See, e.g., Tucker v. Tucker*, 288 N.C. 81, 216 S.E. 2d 1 (1975).

The trial court found the following changes in circumstances occurring between the date of the original custody order and the date of the order at issue: 1) Mrs. Kelly had a child out of wedlock; 2) She and both her children moved to Wisconsin; 3) She married the father of her illegitimate child; and 4) Mr. Kelly remarried.

[2] Remarriage without a finding of fact indicating the effect of remarriage on a child is not a sufficient change of circumstance to justify modification of a child custody order. *Hassell v. Means*, 42 N.C. App. 524, 257 S.E. 2d 123, *disc. rev. denied*, 298 N.C. 568, 261 S.E. 2d 122 (1979). Without a showing that the move to an unfamiliar place proved disruptive or detrimental to Elizabeth's welfare, the change of residence also fails to constitute a substantial change of circumstances. *Gordon v. Gordon*, 46 N.C. App. 495, 265 S.E. 2d 425 (1980).

[3] The difficult question we face is whether the birth of a child out of wedlock constitutes a substantial change of circumstances affecting the welfare of the child when this birth is seen in the light of the facts of this case. In *Dean v. Dean*, 32 N.C. App. 482, 232 S.E. 2d 470 (1977), we stated that the birth of two illegitimate children constituted sufficient change in circumstances to support an order switching child custody. Contrary to the facts in this case, the trial court in *Dean* found the custodial parent unfit. The custodial parent in *Dean* did not legitimate her illegitimate children by marrying their father. We believe that the present case is distinguishable from *Dean*. In the present case the trial court found that both parents are devoted to the child and are fit and proper persons to have primary custody. Mr. Kelly himself admitted that Mrs. Kelly "has done a pretty good job bringing

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[Elizabeth Gail Kelly] up the past few years." Mrs. Kelly has legitimated her new baby by marrying the baby's father.

Under the facts of this case as presented in the record, we hold that the trial court found insufficient changes in circumstances to justify a change in custody. The order of the trial court is therefore vacated.

Judges WHICHARD and JOHNSON concur.

DESOTO TRAIL, INC. v. COVINGTON DIESEL, INC., GENERAL MOTORS CORPORATION, AND PENSKE GM POWER, INC.

No. 8530SC164

(Filed 5 November 1985)

1. Process § 14.3— jurisdiction under long-arm statute—product serviced and used within North Carolina

There were statutory grounds for the exercise of jurisdiction over a Delaware corporation which installed a diesel engine in plaintiff's truck in New Jersey in that the engine was a product serviced by the corporation and used within North Carolina by plaintiff in the ordinary course of trade. G.S. 1-75.4(4)(b).

2. Constitutional Law § 24.7— long-arm jurisdiction—truck engine installed in New Jersey—not licensed to do business in North Carolina—insufficient minimum contacts

Defendant had insufficient minimum contacts with North Carolina to satisfy constitutional due process where defendant was organized under the laws of Delaware; maintained service centers in New York and New Jersey; had sales representatives in New York, New Jersey and Texas; and advertised in trade journals distributed in New York, New Jersey, Pennsylvania and Massachusetts. There was no showing that plaintiff's contract with defendant for the engine had any relationship to this state in the way of a site for performance, a site for tender, or as a legal forum; despite defendant's association with General Motors' nationwide manufacturing network, there was no evidence that defendant ever took any action purposefully to avail itself of the privilege of conducting activities within the forum of North Carolina and defendant's activities were not such that it could reasonably anticipate being haled into court here.

3. Constitutional Law § 24.7; Courts § 1— dismissal for insufficient minimum contacts—no violation of open courts clause

The dismissal of plaintiff's claim against defendant Penske for lack of sufficient minimum contacts did not violate Art. I, § 18 of the North Carolina

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Constitution because plaintiff's claim against Penske for improper installation of a diesel engine is separate and distinct from plaintiff's claims against GM and Covington for breach of warranties; moreover, plaintiff's procedural orientation does not dictate a finding of minimum contacts when minimum contacts do not exist.

APPEAL by plaintiff from *Downs, Judge*. Order entered 19 November 1984 in MACON County Superior Court. Heard in the Court of Appeals 24 September 1985.

Plaintiff is a North Carolina corporation engaged in commercial trucking with its principal place of business in Franklin. Appellee Penske GM Power, Inc. is a corporation organized under the laws of Delaware and an authorized distributor for products of Detroit Diesel Allison, a division of General Motors Corporation. Penske maintains service centers in New York and New Jersey; has sales representatives in New York, New Jersey and Texas; and has advertised in trade journals distributed in New York, New Jersey, Pennsylvania and Massachusetts.

In June, 1982, plaintiff experienced engine problems with a 1979 Kenworth truck, which happened to be in New Jersey at the time, and obtained the services of Penske to install a new engine. The engine, a diesel manufactured by the Detroit Diesel Allison division of General Motors, was installed by Penske at its place of business in Lodi, New Jersey. Plaintiff paid \$10,556.83 for this service. A service warranty issued by General Motors entitled "Power Protection Plan" provided for repair of defective or malfunctioning engine parts by authorized Detroit Diesel Allison distributors and service dealers.

In November, 1983, plaintiff took the truck for repairs to the Charlotte, North Carolina facility of Covington Diesel, also a distributor for Detroit Diesel Allison. A dispute arose with regard to whether Covington's repairs were covered by the service warranty. Plaintiff filed a complaint in Superior Court of Macon County alleging breach of contract and warranties, naming as defendants Covington Diesel, General Motors Corporation, and Penske GM Power. Penske filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b) of the Rules of Civil Procedure, on the grounds of lack of personal jurisdiction. Penske's motion was granted and plaintiff appealed.

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Baley, Baley, Clontz & Schumacher, P.A., by Stanford K. Clontz, for plaintiff.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Allan R. Tarleton, for defendant Penske GM Power.

WELLS, Judge.

The gravamen of plaintiff's first six assignments of error is that the trial court erred in concluding as a matter of law that defendant Penske had insufficient minimum contacts with North Carolina to permit the court to exercise *in personam* jurisdiction. To determine if foreign defendants may be subjected to *in personam* jurisdiction in this State, we apply a two-pronged test. First, we determine whether North Carolina jurisdictional statutes allow our courts to entertain the action. Second, we determine whether our courts can constitutionally exercise such jurisdiction consistent with due process of law. *Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300 (1985).

[1] Statutory jurisdiction arises under N.C. Gen. Stat. § 1-75.4 (1983), the North Carolina "long-arm" statute. This statute should be construed liberally, in favor of finding jurisdiction. *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978). The burden is on the plaintiff to establish *prima facie* that one of the statutory grounds applies. *Marion v. Long, supra*. Plaintiff contends that, under the alleged facts, "[p]roducts, materials or thing[s] processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade." G.S. 1-75.4(4)(b). Construing the statute liberally, we find that the engine installed in plaintiff's truck by Penske was a product serviced by Penske and used within this State by plaintiff in the ordinary course of trade; therefore, there were statutory grounds for the exercise of jurisdiction.

[2] The exercise of statutory jurisdiction must meet the test of constitutional due process, requiring the defendant to have sufficient minimum contacts with the forum state to ensure that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Minimum contacts do not arise *ipso facto* from actions of a defendant having an effect in the forum state. *Kulko v.*

DeSoto Trail, Inc. v. Covington Diesel, Inc.

Superior Court, 436 U.S. 84, 56 L.Ed. 2d 132, 98 S.Ct. 1690 . . . (1978). There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business there, *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 . . . (1958), such that he or she should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980).

Ciba-Geigy Corp. v. Barnett, slip op. no. 8418SC389 (N.C. App. filed 17 September 1985).

Even accepting plaintiff's allegations as true, there is no showing that plaintiff's contract with Penske for the engine had any relationship to this State in the way of a site for performance, a site for tender or as a legal forum. Penske's place of business is New Jersey and the widest possible characterization of its service area would be the states of New Jersey, New York, Texas, Pennsylvania and Massachusetts. Penske has no sales representatives or service centers in North Carolina and does not advertise here. It is not licensed to do business in this State. Clearly, Penske's activities were not such that it could reasonably anticipate being haled into court here. *See Marion v. Long, supra*.

Plaintiff contends that Penske had been "drinking heavily from the waters of the stream of interstate commerce" by associating itself with General Motors' nationwide manufacturing network. This argument is without merit. There is no evidence that Penske ever took any action purposefully to avail itself of the privilege of conducting activities within the forum of North Carolina. *See Sola Basic Industries v. Electric Membership Corp.*, 70 N.C. App. 737, 321 S.E. 2d 28 (1984), *citing Hanson v. Denckla, supra*.

[3] Finally, plaintiff contends that the dismissal as to Penske effectively precludes plaintiff from litigating its claims and exercising its right to "have remedy by due course of law" under N.C. Const. art. 1, § 18. Plaintiff's claim against Penske for improper installation is separate and distinct from the claims against GM and Covington for breach of warranties. Dismissal of the Penske claim should not prejudice plaintiff's other claims. In any case, plaintiff's procedural orientation may not dictate a finding of

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minimum contacts when minimum contacts do not exist on the facts.

Affirmed.

Judges ARNOLD and MARTIN concur.

STATE OF NORTH CAROLINA v. RANDOLPH FAIR

No. 8427SC1161

(Filed 5 November 1985)

1. Criminal Law § 48.1— silence of defendant—admission as harmless error

While the admission of a police officer's testimony that after being warned of his *Miranda* rights, defendant declined to make any statement may have been erroneous, such error was not prejudicial where no one else was present, no accusatory or incriminating statement requiring a response had been made, and defendant's silence was to be expected.

2. Criminal Law § 34.4— evidence of other crime—competency to connect defendant with stolen money

An identification card fraudulently obtained from the Department of Motor Vehicles that was dropped by defendant when police approached was properly admitted to connect defendant with money also dropped by defendant even though it may have shown defendant's commission of another crime.

3. Burglary and Unlawful Breakings § 5.4; Larceny § 7.4— inability to identify stolen money—applicability of recent possession doctrine

Although the victim was unable to identify money found in defendant's possession as money stolen from her home, the trial court properly instructed the jury on the doctrine of possession of recently stolen property where there was evidence that a small bag of coins was stolen from the victim's house, defendant was seen leaving the victim's house with what looked like a small bag in his hand, and officers pursued and caught defendant with a toboggan full of coins before he could leave the area.

4. Criminal Law § 138— victim's age as improper aggravating factor

The trial court erred in finding as an aggravating factor for felonious breaking or entering and misdemeanor larceny that the victim was very old where the evidence showed that the victim was 76 years old but failed to show that her age was a factor in the crimes or that the harm was worsened because of her age.

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APPEAL by defendant from *Collier, Judge*. Judgment entered 29 May 1984 in Superior Court, GASTON County. Heard in the Court of Appeals 22 August 1985.

Defendant was convicted of felonious breaking or entering and misdemeanor larceny. The State's evidence, in pertinent part, tended to show that: About 11 o'clock on the morning of 26 January 1984, a few minutes after Ms. Ollie Broome left for work, a neighbor saw defendant enter her house through a window and telephoned the police and another neighbor, who saw defendant leave the house, carrying something in his left hand that looked like a bag, and walk into the woods at the end of the street. A few minutes later the police surrounded the wooded area and an adjoining railroad yard and as they approached defendant he dropped a toboggan containing 26 quarters, 36 nickels, 40 dimes and 89 pennies, as well as 21 one dollar bills, 5 ten dollar bills, 4 five dollar bills, and a pocketbook containing an identification card issued by the Department of Motor Vehicles pursuant to G.S. 20-37.7; the card had defendant's picture on it, but was issued to a deceased person. Ms. Broome, upon being called by the police, returned home and found that a locked wardrobe had been broken into and about \$900 in bills and a small bag nearly full of change had been taken. She admitted that she had no way of identifying any of the coins and bills in defendant's possession as being the same coins and bills that were stolen from her.

Attorney General Thornburg, by Assistant Attorney General Douglas A. Johnston, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

PHILLIPS, Judge.

[1-3] Defendant contends that his trial was erroneously prejudiced by the court in three respects—by receiving into evidence testimony that he said nothing following his arrest and the *Miranda* warnings; by receiving evidence concerning his false identification card; and by charging the jury on the doctrine of recent possession. These contentions have no merit and require little discussion. The arresting officer testified that after warning defendant of his *Miranda* rights the defendant declined to make any statement and he asked him no questions. Though this may

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have been error, under the circumstances it was not prejudicial, in our opinion. No one else was present, no accusatory or incriminating statement requiring a response had been made by anyone, and defendant's silence was to be expected; it was not tantamount to an admission of anything, and implied, at most, only that he preferred to remain silent, as was his right. And the fraudulently obtained identification card that had defendant's likeness on it was not erroneously received just to show that defendant had committed other crimes and was thus a bad man, as defendant contends; it was received for the proper purpose of connecting him with the coins and bills that he also dropped when the police approached. And contrary to defendant's contention, the doctrine of recent possession did arise on the evidence presented and was properly charged by the court, even though Ms. Broome could not positively identify the 191 quarters, dimes, nickels and pennies in defendant's toboggan as being the identical coins that were stolen from her house but a few moments earlier. While the recent possession doctrine, of course, does not apply unless the property recently possessed is that which was stolen, *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981), this fact, as all others in criminal cases, can be established by circumstantial evidence. And, to say the least, the circumstances recorded in this case—of defendant being seen leaving Ms. Broome's house with what looked like a small bag in his hand; of a small bag of coins being stolen from her house; and of law officers pursuing and catching him with a toboggan full of coins before he could leave the area—were sufficient to establish that the coins then possessed were some of the same ones stolen from Ms. Broome's house a few minutes earlier. In a case also involving stolen currency that the owner could not positively identify as his, our Supreme Court recognized that the recent possession doctrine nevertheless could apply if the jury found beyond a reasonable doubt from the evidence that the bills possessed by the defendant were those stolen from the owner. *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968). A new trial was granted in that case, not because the doctrine was charged, but because the charge failed to make plain that the State had the burden to prove that the money possessed was the same money that was stolen. In this case the charge had no such defect. Thus, we find no error in defendant's conviction.

[4] But defendant's contention that he is entitled to be resentenced is well taken and we remand the matter to the Superior

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Court for that purpose. As a basis for exceeding the presumptive sentence the court found as aggravating factors that the victim of the crime was very old and that defendant had a prior conviction of criminal offenses punishable by more than sixty days confinement. The finding as to defendant's criminal record was proper, as the District Attorney read of defendant's convictions from his court record and no objection was made thereto. *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982). But in our opinion the finding as to the victim's age was not proper. Though the evidence shows that Ms. Broome was 76 years old at the time it does not show that her aged condition was a factor in the crime being committed or that the harm was worsened because of that fact. *State v. Rivers*, 64 N.C. App. 554, 307 S.E. 2d 588 (1983). So far as the record shows, defendant simply entered and stole from an unoccupied house and the victim's age had nothing to do with it.

No error as to the trial.

Vacated and remanded as to the sentence.

Judges WELLS and WHICHARD concur.

TOMMY B. LANCASTER, MILDRED H. LANCASTER, BRYANT FRED LANCASTER AND LUTHER HOLLAND v. LUMBY CORPORATION, CHARLEY COGGINS AND WIFE, LINDA C. COGGINS

No. 8522SC130

(Filed 5 November 1985)

Vendor and Purchaser § 1.4— action to enforce option to buy land—summary judgment for plaintiffs proper—no abandonment or breach of option

Summary judgment was properly entered for plaintiffs in an action to enforce an option to buy land upon which a restaurant building was situated where defendants admittedly gave plaintiffs a five-year option in 1974; extended the option in 1976 until 1 June 1984, with a purchase price after 31 May 1979 of \$180,000; and plaintiffs notified defendants on 19 March 1984 that they were exercising the option and tendered a certified check for \$180,000. Plaintiffs did not abandon or breach the option when one plaintiff neither agreed with nor refuted a statement in 1981 that the option was no longer in effect; the provisions plaintiffs allegedly breached were oral lease provisions; nothing in the evidence suggested that the validity of the option hinged upon plaintiffs'

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compliance with the lease; and the evidence failed to show a breach of the written or oral lease provisions.

APPEAL by defendant from *Davis, James C., Judge*. Order entered 29 October 1984 in Superior Court, IREDELL County. Heard in the Court of Appeals 14 October 1985.

Barnes, Braswell & Haithcock, by Henson P. Barnes, and Homesley, Jones, Gaines & Fields, by T. C. Homesley, Jr., for plaintiff appellees.

Hunter, Wharton & Howell, by V. Lane Wharton, Jr., and Joslin, Culbertson & Sedberry, by John K. Culbertson, for defendant appellants.

PHILLIPS, Judge.

Plaintiffs sued to enforce an alleged option to buy certain land in Iredell County upon which a restaurant building is situated that some of the plaintiffs have had under lease since 1974. At a hearing following the completion of discovery and the taking of several depositions, the court entered an order of summary judgment requiring defendants to convey the land to the plaintiffs Tommy B. Lancaster, Bryant Fred Lancaster and Luther Holland upon receiving \$180,000, less the rental collected since 20 March 1984, if any. The order was correctly entered and we affirm it.

The defendants admittedly did the following: On 12 April 1974, they gave plaintiffs Tommy B. and Mildred H. Lancaster a five-year written option to buy the land and building involved, including the restaurant fixtures and furnishings, for \$200,000, less certain rental payments thereafter made; on 14 December 1976, they extended the option period in writing until the first day of June 1984 and provided that if the optionees elected to buy the property after the 31st day of May 1979 the price would be \$180,000; on 1 March 1977, they consented in writing to the assignment and transfer of both the original option and the extension to plaintiffs Tommy B. Lancaster, Bryant Fred Lancaster and Luther Holland, who still hold them. Defendants also concede that on 19 March 1984 plaintiffs Tommy B. Lancaster, Bryant Fred Lancaster and Luther Holland notified defendants in writing that they were exercising their option to buy the property involved and tendered to them a certified check in the amount of \$180,000,

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which defendants rejected. This evidence plainly establishes that plaintiffs Tommy B. Lancaster, Bryant Fred Lancaster and Luther Holland had an enforceable option to buy defendants' property and exercised it within the time allowed and in the manner agreed to. Thus, no genuine issue of material fact remained for the court to try and the judgment declaring that plaintiffs were entitled to have defendants deed the property to them was properly entered. While defendants admit executing the various documents referred to, they claim that the documents are no longer in effect because plaintiffs had abandoned and waived their rights to exercise the option, and had breached the option terms. Neither claim is supported by evidence.

While an abandonment or waiver of rights under a written option or other contract can be established by oral evidence, as the defendants correctly maintain, such evidence must be positive, unequivocal, and inconsistent with the contract. *Bell v. Brown*, 227 N.C. 319, 42 S.E. 2d 92 (1947). An abandonment of contract rights cannot be inferred from acts that are ambiguous or equivocal. *Hayes v. Griffin*, 13 N.C. App. 606, 186 S.E. 2d 649 (1972). No evidence is recorded that any of the plaintiffs ever stated or suggested that the option either had been or would be abandoned; or that plaintiffs ever took any positive step or committed any positive act that was incompatible with the continued existence of the option. The evidence that defendants contend support an inference that plaintiffs intended to abandon the option is that in 1981 the defendant Charlie Coggins, without explaining why or going into detail, told plaintiff Luther Holland that he did not feel that the option was still in effect, and Holland neither agreed with nor refuted the statement. Such is not the law, and no court decision or other authority suggesting that it is has been called to our attention. Under the circumstances that existed Holland's silence signified only that he did not care to argue with Coggins about the continued validity of the option. Coggins was neither the custodian nor arbiter of plaintiffs' option rights, and if his comment had any purpose, or was calculated to lead to any action by either party, the evidence does not disclose it. A holder of valuable contract rights does not lose them by remaining silent when a mere opinion is expressed that the rights no longer exist.

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Defendants' other contention is not that the evidence raises an issue as to plaintiffs' breach of the written option; it is rather that the option and lease agreement between the same parties are integrated documents and that plaintiffs violated the terms of the latter. Both instruments are clear and nothing in either suggests that the validity of the option hinges upon plaintiffs complying with the terms of the lease; but even if that was not the case no evidence that plaintiffs breached the written lease is recorded. Furthermore, when sifted down, defendants do not contend that any particular clause in the written lease was breached; the contention really is that plaintiffs violated certain oral provisions. Though these latter provisions have no legal effect, since they would violate the parol evidence rule, the evidence fails to show that any of them were breached either. One purported breach was the plaintiffs' failure to extend the original lease in 1976 after orally agreeing to do so; but a duly executed extension of the lease through the 31st day of May 1984 is in the record. The other purported breaches are of similar vintage and substance; for the evidence clearly establishes that even if they occurred defendants waived them by accepting the lease benefits for at least seven years thereafter and only claimed that they were breaches after plaintiffs exercised their option to buy the property.

Affirmed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. WILLIE DOUGLAS ELLIOTT

No. 8512SC237

(Filed 5 November 1985)

1. Criminal Law § 163— failure to summarize credibility evidence—absence of objection at trial

Defendant's failure to object to the charge or to request additional instructions precluded defendant from assigning as error the court's failure to summarize testimony that the prosecutrix had asked a defense witness to testify falsely against defendant. The court's failure to summarize such testimony was not plain error since it bore only on the subordinate issue of the credibility of the prosecutrix. App. Rule 10(b)(2).

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2. Criminal Law § 138— mitigating factor—dismissal of rape and sexual offense charges—victim's consent to incest not shown

The dismissal of rape and sexual offense charges against defendant did not show that defendant's act of incest with his sixteen-year-old stepdaughter was with her consent so as to require the trial court to find as a statutory mitigating factor for incest that defendant's victim was more than sixteen years old and consented to defendant's conduct. G.S. 15A-1340.4(a)(2)g.

3. Criminal Law § 138— good work record—failure to find as a mitigating factor

The trial court did not abuse its discretion in failing to find as a non-statutory mitigating factor that defendant had a good work record.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 4 October 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 September 1985.

In a three-count indictment defendant was charged with incest, second degree rape and second degree sexual offense. At the close of the State's evidence the court dismissed the second degree rape charge and reduced the second degree sexual offense charge to the lesser included offense of crime against nature. The jury found the defendant guilty of both offenses, but the court arrested judgment as to the latter conviction because the evidence did not support it. The State's evidence tended to show that defendant had sexual intercourse with his sixteen year old stepdaughter, Warrenette, on 12 June 1983. Defendant did not testify but his fifteen year old daughter, Tekio, upon his behalf testified that: Warrenette, who regarded defendant as being overstrict and oppressive because he disapproved of her keeping company with soldiers and other boys and wanted to get him out of the house and be free of his discipline, had urged her to testify falsely that defendant had had sexual relations with both of them, and that she was in the house where defendant and Warrenette were on the day involved and nothing out of the way occurred.

Attorney General Thornburg, by Assistant Attorney General Nonnie F. Midgette, for the State.

Appellate Defender Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

PHILLIPS, Judge.

[1] By his first assignment of error defendant contends that the trial court erred in instructing the jury by failing to include a

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summary of the testimony of Tekio Elliott to the effect that the prosecuting witness had asked her to testify falsely against defendant in order to escape his control and discipline. Defendant is precluded from asserting this assignment of error since the record discloses that, though he had the opportunity to do so, defendant neither objected to the charge nor requested any additional instructions. Rule 10(b)(2), N.C. Rules of Appellate Procedure. The contention that the court's failure to summarize this particular testimony was plain error under the rule laid down in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) is without merit. This testimony bore on a subordinate issue in the case, the prosecuting witness's credibility, which the court was not required to charge on in detail in the absence of a request, which defendant failed to make. *State v. McCaskill*, 270 N.C. 788, 154 S.E. 2d 907 (1967). Defendant's other assignments of error, likewise without merit, relate to his sentencing.

[2] In sentencing defendant the court found in aggravation that he had a record of prior convictions punishable by more than sixty days imprisonment, found no factors in mitigation, and sentenced defendant to a prison term in excess of the presumptive sentence for incest. Defendant first contends that the court was required to find in mitigation that his victim was more than sixteen years of age and consented to defendant's conduct, a factor established by statute. In support of this contention defendant points out that the evidence shows without contradiction that the stepdaughter was more than sixteen years old when the offense occurred and that the dismissal of the rape and sexual offense charges establishes that the incestuous act was done with her consent. We disagree. The dismissals mean that the evidence failed to show that defendant's act was committed "[b]y force and against the will of the other person," as G.S. 14-27.3 and G.S. 14-27.5 require; they do not mean, as defendant appears to argue, that the acts were done with her consent, a different question entirely. Though under G.S. 15A-1340.4(a)(2)g, a defendant is entitled to a factor in mitigation when the victim was more than sixteen years of age and defendant's conduct was "consented to," the burden of establishing both the conditions stated is on the defendant. *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983). The first condition, the age of defendant's victim, was indisputably established by the evidence; but the second condition, that she

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consented to sexual intercourse with defendant was not. While the evidence shows that she did not physically resist the defendant's advances, it also shows, by her testimony, that she was living under his control, was very afraid of him, and felt that the only thing she "could do was just give in." This conflicting evidence was for the trial judge to appraise and we cannot say that both statutory conditions were proven.

[3] Defendant finally contends that the court erred in failing to find as a non-statutory factor in mitigation that he had a good work record. G.S. 15A-1340.4(a) permits the sentencing judge to consider any aggravating and mitigating factors, whether set forth in the statute or not, that he "finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing." Defendant argues that the evidence of his good work record is uncontradicted and manifestly credible and that it is reasonably related to the rehabilitative purposes of sentencing set forth in G.S. 15A-1340.3. Though this argument is sound it does not follow that the judge was required to find a mitigating factor based thereon. As our Supreme Court recently noted in *State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985), the statute does not require the judge to find non-statutory factors that the evidence establishes, it merely permits him to do so. Thus, when the judge declined to find the factor referred to he was but exercising his discretion, for which there is no appellate relief in the absence of abuse, and none has been shown.

No error.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS SHIPMAN

No. 8512SC23

(Filed 5 November 1985)

1. Forgery § 2.2— forged endorsement of check—fictitious name—proof of lack of authority not needed

The evidence that defendant had forged an endorsement on a check was sufficient without proof that the payee's signature was unauthorized where the

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only indication that the payee, Tommy Jones, was an actual person was a self-serving statement defendant made to an officer; defendant neither testified nor presented evidence; defendant falsely told the bank he was Jones, gave the bank a false address, and falsely told an officer that John Bowman, the person on whose account the check was drawn, had given him permission to use his name; neither Bowman nor the bank knew a Tommy Jones; and Maryland police told Fayetteville officers that Tommy Jones was, in fact, defendant.

2. Criminal Law § 34.7— forgery—other offense—admissible to show knowledge, intent, plan

The trial court did not err in a prosecution for forging checks on the account of John Bowman by admitting evidence that defendant was arrested at a First Citizens Bank with a savings deposit book on an account he had opened there in the name of John Bowman. Although the evidence tended to show that defendant committed other crimes, it was competent to establish defendant's guilty knowledge and criminal intent or plan. Rule 404, N. C. Rules of Evidence.

APPEAL by defendant from *Herring, Judge*. Judgments entered 5 September 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 September 1985.

Tried on four 4-count indictments, defendant was convicted of sixteen counts of forgery involving four checks payable to Tommy Jones that were drawn on the Baltimore bank account of John Oliver Bowman, and accepted for deposit by Wachovia Bank & Trust Company in Fayetteville. Each indictment concerned a particular check and charged defendant with (1) counterfeiting it, by forging Bowman's signature thereon in violation of G.S. 14-119; (2) passing the check as genuine to Wachovia Bank & Trust Company in violation of G.S. 14-120; (3) forging and counterfeiting the check by placing the false endorsement of Tommy Jones thereon in violation of G.S. 14-120; and (4) passing and delivering the falsely endorsed check to Wachovia Bank & Trust Company in violation of G.S. 14-120.

The State's evidence, in pertinent part, tended to show that: Defendant stole some blank checks and a birth certificate from John Oliver Bowman, drew four checks in favor of Tommy Jones on Bowman's account, opened an account at Wachovia Bank in the name of Tommy Jones by using a photo identification card which identified defendant as Tommy Jones, deposited the four checks purportedly given by Bowman in the account, and later withdrew some of the funds therefrom. It was later ascertained that the

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Fayetteville address that defendant gave the bank did not exist. After Bowman reported the forgeries to the Baltimore police they told the Fayetteville officers that "William Shipman was in fact the Tommy Jones that had opened the account." When arrested defendant had on his person or in his belongings identification cards in the names of John Oliver Bowman, Tommy Jones, and William Thomas Shipman, each of which had defendant's photograph thereon. Among other things, defendant told the arresting officer that Bowman gave him permission to use his name; that Tommy Jones, a friend of his, gave him his birth certificate and permission to use his name; and that he, the defendant, had even served in the Army in the name of Tommy Jones. Bowman knew no Tommy Jones and neither issued nor authorized the issuance of the checks to him; he knew defendant, who he met in a Washington bar and entertained as a house guest for several days, as Delano Delaurentis Donati. The police made no effort to locate Tommy Jones. Defendant presented no evidence.

Attorney General Thornburg, by Assistant Attorney General Steve Nimocks, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Robin E. Hudson, for defendant appellant.

PHILLIPS, Judge.

[1] John Oliver Bowman, whose bank account was falsely drawn on, testified in the trial and defendant does not contend that the State's evidence does not support the eight convictions based on counterfeiting and passing checks purportedly signed by Bowman. Tommy Jones, though, the purported payee and endorser of the counterfeit checks, did not testify; and defendant contends that the State's failure to prove that Jones did not authorize him to endorse the checks requires the dismissal of the other eight counts based on falsely endorsing Tommy Jones' name. If the evidence showed that the Tommy Jones named as payee on the checks is a real person and the circumstances were not as they are defendant's point would be well taken. Because, nothing else appearing, to convict a defendant of forgery it is not enough to show that he signed another's name to an instrument and passed it as genuine; it must also be shown that the instrument was false, which usually requires proof that the person who did the

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signing had no authority to do so. *State v. Dixon*, 185 N.C. 727, 117 S.E. 170 (1923). "[I]f the purported maker is a real person and actually exists, the State is required to show not only that the signature in question is not genuine, but was made by defendant without authority." *State v. Phillips*, 256 N.C. 445, 448, 124 S.E. 2d 146, 148 (1962). This is because the law generally presumes that one signing another's name has authority to do so. 37 C.J.S. *Forgery* Sec. 80 (1943).

But, of course, as common sense and logic indicate and *State v. Phillips*, *supra* makes plain, when the name affixed to or put in an instrument is fictitious, a lack of authority to sign that name need not be shown, because authority could not have been given. And in this case, contrary to defendant's contention, the evidence does not show that Tommy Jones is a real person. Defendant neither testified nor presented evidence and the only indication in the record that Tommy Jones is an actual person is a self-serving statement defendant made to the law officer that Jones gave him his identification card and authorized him to use his name; under the circumstances neither the State nor the jury were obliged to accept that statement as being true. Defendant falsely told the bank he was Tommy Jones, gave them a false address, and falsely told the officer that Bowman gave him permission to use his name; neither Bowman nor the bank knew any real Tommy Jones, and the Maryland police told the Fayetteville officers that Tommy Jones was in fact the defendant. Viewed not in the light most favorable to the State, but simply in context, the State's evidence clearly shows that Tommy Jones was but a creature of defendant's fertile and thievish imagination; and the contention that the State's case must fail because it was not shown that Jones did not authorize the endorsements is absurd. It is fundamental in the trial of lawsuits that litigants, including the State, are free to follow their own theories if legally sound and supportable by evidence; and they are never obliged to lose themselves on the false trails laid down by their adversaries. Under the circumstances of this case, no presumption could conceivably arise that Tommy Jones, even if real, authorized defendant to endorse the checks; because defendant, himself, drew the checks in Jones' favor knowing that they were counterfeit. Thus, the only "authority" Jones could have given him would have been to complete the

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swindle by signing his name and thus commit a criminal act—a power no person can convey to another.

[2] Defendant also assigned as error the trial court's admission of testimony as to the circumstances of his arrest. The officer testified that he arrested defendant at First Citizens Bank and that defendant had on his person a First Citizens Bank savings deposit book on an account that he had opened there in the name of John Bowman. Defendant's general objection to this evidence was properly overruled. Though the evidence does tend to show, as defendant argues, that he had committed still other crimes, it is nevertheless competent to establish defendant's guilty knowledge and criminal intent or plan in this case. Rule 404, N.C. Rules of Evidence. Defendant's other assignment of error, which merits no discussion, is also overruled.

No error.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. CHARLIE JOHNSON MANN

No. 8515SC538

(Filed 5 November 1985)

Criminal Law § 4; Robbery § 6.1— solicitation to commit robbery—not “infamous” misdemeanor

Solicitation to commit common law robbery is not an “infamous” misdemeanor punishable as a Class H felony under G.S. 14-3(b) since the element of an overt act done toward the commission of the felony is absent in such crime.

APPEAL by defendant from *Hobgood, Judge*. Judgment entered 25 May 1984 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 28 October 1985.

Defendant was indicted for solicitation to commit robbery. After a trial by jury, defendant was found guilty as charged. From a judgment imposing a seven year prison sentence for conviction of a Class H felony under G.S. 14-3, defendant appealed.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General Evelyn M. Coman, for the State.

Assistant Appellate Defender David W. Dorey, for defendant, appellant.

HEDRICK, Chief Judge.

By his first assignment of error argued on appeal, defendant contends that the trial court erred in sentencing him to a seven year prison term, because the offense of which defendant was convicted, solicitation to commit common law robbery, is not an "infamous" misdemeanor punishable as a Class H felony. We agree.

G.S. 14-3 provides for the punishment of misdemeanors for which no specific punishment is otherwise prescribed by statute. Subsection (b) of this statute provides that an "infamous" misdemeanor is a Class H felony, which is punishable by a maximum prison term of ten years and a presumptive term of three years. A misdemeanor which does not fall within the category of infamous misdemeanors is punishable by fine, imprisonment not to exceed two years, or both, pursuant to G.S. 14-3(a).

G.S. 14-3(b) and the reported cases do not establish with certainty what misdemeanors may be designated and punished as "infamous." *State v. Keen*, 25 N.C. App. 567, 214 S.E. 2d 242 (1975). In determining whether an offense falls within the class of misdemeanors punishable under G.S. 14-3(b), we must bear in mind the general rule of statutory construction that criminal statutes are to be strictly construed against the State. *State v. Hageman*, 307 N.C. 1, 296 S.E. 2d 433 (1982).

In *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949), the Supreme Court held that attempted burglary is infamous because it is "an act of depravity; it involves moral turpitude, reveals a heart devoid of social duties and a mind fatally bent on mischief." *Id.* at 277, 52 S.E. 2d at 883. The Court reasoned that in light of G.S. 14-3(b), which punishes misdemeanors as felonies, the meaning of "infamous" must be determined with reference to the degrading nature of the offense and not to the measure of punishment.

Common law robbery is an infamous crime which consists of the felonious taking of money or goods of any value from the per-

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son of another or in his presence against his will, by violence or putting him in fear. *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853 (1956). An attempt to commit a common law robbery is also an infamous crime because "[a]n attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission. . . ." *Id.* at 741, 94 S.E. 2d at 856.

In *State v. Tyner*, 50 N.C. App. 206, 272 S.E. 2d 626 (1980), *disc. rev. denied*, 302 N.C. 633, 280 S.E. 2d 451 (1981), this Court held that solicitation to commit a crime against nature is not an infamous misdemeanor, although a crime against nature is an infamous offense and an attempt to commit a crime against nature is infamous within the meaning of G.S. 14-3. The Court contrasted solicitation to commit a felony with an attempt to commit a felony: solicitation consists of counseling, enticing, or inducing another to commit a crime and is complete with the act of solicitation, while an attempt involves an intent to commit the felony and an overt act towards its commission. Since the crime of solicitation, unlike attempt, does not require an overt act, the Court held that the two offenses are separate and distinct and, therefore, that solicitation to commit a crime against nature is not an "infamous misdemeanor" punishable under G.S. 14-3(b).

In light of the reasoning applied in *State v. Tyner*, we do not believe that the solicitation to commit common law robbery falls within the class of misdemeanors punishable as felonies under G.S. 14-3(b). The element of an overt act done towards the commission of the felony, which compelled the Court in *State v. McNeely* to hold that an attempt to commit a common law robbery is an infamous misdemeanor, is absent in the crime of solicitation to commit common law robbery.

Defendant contends that the trial judge coerced a verdict by instructing the jury to continue deliberations when the foreman indicated that they had been unable to reach a verdict. We have examined this contention and find it without merit. G.S. 15A-1235.

We find no error in the trial of this case; but the case is remanded to superior court for resentencing as a misdemeanor.

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No error in part; remanded in part.

Judges EAGLES and MARTIN concur.

STATE OF NORTH CAROLINA v. WALTER EUGENE SPINKS, JR.

No. 8518SC429

(Filed 5 November 1985)

Criminal Law § 34.7— armed robbery—other offense—admissible

The trial court did not err in a prosecution for robbery with a dangerous weapon by admitting evidence that the day before the robbery defendant had pled guilty to an offense in U.S. District Court, sentencing had been deferred for four days with the suggestion that defendant would be placed on probation and fined \$2,500, and defendant had been told to have the money with him on the scheduled hearing date. The evidence was relevant and admissible under Rule of Evidence 404(b) in that it tended to show that defendant had a motive for the commission of the robbery; moreover, any error was harmless because the evidence against defendant was overwhelming.

Judge WELLS dissenting.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered 3 October 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 October 1985.

Defendant was indicted for robbery with a dangerous weapon. The State offered evidence which tended to show that at about midnight on 8 March 1984 Gerald Wheat left a "gambling house" and started home. As he neared home he noticed that he was being followed. When Wheat pulled into his driveway, he was accosted by a black male carrying a weapon. The robber took \$571 from Wheat's wallet and bound and gagged the victim. The robber also took Wheat's briefcase from his vehicle. Wheat identified the defendant as the robber and described the robber's vehicle as a 1970 to 1974 yellow Buick with a black top.

At approximately 12:30 a.m., a High Point police officer received a description of the car used in the robbery. Shortly thereafter he saw a vehicle matching that description. The officer attempted to stop the vehicle. After a three-mile chase a black male jumped out of the car and fled. Wheat's briefcase and per-

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sonal effects of the defendant were recovered from the vehicle, which was registered to the defendant. The State also presented, over defendant's objection, evidence which showed that the day before the robbery the defendant had pleaded guilty to an offense in U.S. District Court. The trial court required the State to present the evidence in summary form, which was read to the jury as follows:

The defendant, Walter Eugene Spinks, appeared in United States District Court, Greensboro, North Carolina, on March 8th, 1984, in a hearing before U.S. District Court Judge Richard C. Erwin, which convened at 11:30 a.m.

Walter Eugene Spinks was advised by Judge Erwin that he was subject to a maximum imprisonment of two years and a possible fine of \$10,000.

Judge Erwin deferred sentencing until Monday, March 12th, 1984, and suggested to Walter Eugene Spinks that he, Spinks, will [sic] be placed on probation and fined \$2,500, and Spinks was to have the money or the availability of \$2,500 with him, Spinks, on Monday, March the 12th, 1984.

The Court advised Spinks to have the money with him on Monday, or his mother in court to transfer the money. The hearing was adjourned on March 8th, 1984.

The jury was not informed as to the nature of the offense, which was possession of a firearm by a convicted felon.

The defendant presented evidence from his sister and the sister's companion that defendant spent the night of the robbery at the sister's home in Ramseur. Defendant also attempted to present evidence that on the day after the robbery he attempted to report his car stolen.

Defendant was convicted as charged. From a judgment sentencing him to forty years imprisonment, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney T. Byron Smith, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant appellant.

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ARNOLD, Judge.

The sole issue presented for review is whether the trial court erred by allowing the State to introduce evidence that on the day prior to the robbery of Mr. Wheat the defendant had pleaded guilty to a crime in federal court and that he had been ordered to pay a fine of \$2,500. Finding no error, we affirm the defendant's conviction.

Rule 404(b) of the North Carolina Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

This rule is consistent with prior North Carolina law. See *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

The evidence in the case *sub judice* was admitted for the limited purpose of showing that the defendant needed money and, thus, had a motive to commit the robbery. Defendant relying upon *State v. Higgins*, 66 N.C. App. 1, 310 S.E. 2d 644, *aff'd* 310 N.C. 741, 314 S.E. 2d 550 (1984), argues that such an admission was improper. In *Higgins* this Court held that it was improper to admit pawnshop tickets to show that the defendant needed money and thus had a motive to commit the crime. *Higgins* is distinguishable from the case at bar because there the Court found that it was improper to introduce such evidence because it "would expose all generally needy persons to the risk of finding of guilt based in part upon their need for means of sustenance." 66 N.C. App. at 19, 310 S.E. 2d at 653. Such is not the case with the complained of evidence in this case. In this instance the evidence that defendant was facing a twenty-five hundred dollar fine showed that he had a specific need to obtain a large sum of money. This evidence was relevant because it tended to show that defendant had a motive for the commission of the robbery. Thus, the evidence was properly admitted pursuant to Rule 404(b).

Assuming *arguendo* that it had been error to admit such evidence, the error was harmless because the evidence against

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defendant was so overwhelming that there is not a reasonable possibility that a different result would have been reached even if the complained of evidence had not been admitted.

No error.

Judge MARTIN concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In my opinion, the evidence of defendant's conviction of another offense, presented in the State's case-in-chief, was inadmissible to show defendant's motive to commit the offense he was on trial for in this case. I cannot agree that the evidence against defendant in this case was so overwhelming as to render this error harmless. I vote to award defendant a new trial.

LESTER H. YANDLE, JR., AND MARY H. YANDLE v. MECKLENBURG COUNTY, NORTH CAROLINA

MECKLENBURG COUNTY, NORTH CAROLINA v. TOWN OF MATTHEWS AND LESTER H. YANDLE, JR.

No. 8526SC403

(Filed 5 November 1985)

Appeal and Error § 6.2; Injunctions § 13— preliminary injunction—non-appealable interlocutory order—no authority to prohibit conveyance of property

A preliminary injunction prohibiting a town from annexing certain property and prohibiting a county from condemning the property was a non-appealable interlocutory order where there was no evidence that either the town or the county will be irrevocably harmed if the status quo is maintained until a final hearing. However, the trial court had no authority to enter that portion of the preliminary injunction prohibiting the landowners from conveying their property since such relief is not reasonably necessary to protect a party's rights.

APPEAL by defendants from *Burroughs, Judge*. Orders of preliminary injunction entered 31 December 1984. Heard in the Court of Appeals 28 October 1985.

Yandle v. Mecklenburg County; Mecklenburg County v. Town of Matthews

These are civil actions wherein plaintiff Mecklenburg County seeks to permanently enjoin the Town of Matthews from annexing certain property in Mecklenburg County belonging to Lester and Mary Yandle, and plaintiffs Lester and Mary Yandle seek to permanently enjoin Mecklenburg County from condemning their land.

The record discloses the following uncontradicted facts: 1) Lester and Mary Yandle own a 300 acre vacant tract of land in Mecklenburg County adjacent to the town of Matthews; 2) On 1 October 1984, the Mecklenburg County Board of County Commissioners publicly announced interest in part of the Yandle property as part of a potential landfill site; 3) Also on 1 October 1984, Lester and Mary Yandle filed a petition with the Town of Matthews requesting voluntary annexation of their property; 4) On 5 November 1984, the Mecklenburg County Board of County Commissioners directed the county manager to notify Lester and Mary Yandle of the County's intention to condemn their property; 5) On 26 November 1984, the Town Council of Matthews passed a resolution opposing the use of the Yandle property as a landfill; 6) Lester and Mary Yandle filed an action on 5 December 1984 to enjoin Mecklenburg County from condemning their property; 7) Mecklenburg County filed an action on 7 December 1984 to enjoin the Town of Matthews from annexing the Yandle property; 8) Also on 7 December 1984, Judge Burroughs issued temporary restraining orders enjoining Matthews from annexing the Yandle property and Mecklenburg County from condemning the Yandle property.

The matters came on for hearing before Judge Burroughs on 27 December 1984. After a hearing, Judge Burroughs made detailed findings of fact and conclusions of law. Preliminary injunctions prohibiting Matthews from annexing the Yandle property, prohibiting Mecklenburg County from condemning the property and prohibiting the Yandles from taking action affecting the title to their property were entered on 31 December 1984.

From orders prohibiting annexation, condemnation and conveyance of title, defendants Town of Matthews, County of Mecklenburg and Lester and Mary Yandle appealed.

Yandle v. Mecklenburg County; Mecklenburg County v. Town of Matthews

Ruff, Bond, Cobb, Wade & McNair, by James O. Cobb and Marvin A. Bethune, for Mecklenburg County, plaintiff, appellee and defendant, appellant.

Horack, Talley, Pharr & Lowndes, by Benjamin S. Horack and Neil C. Williams, and Griffin and Ruff, by Joseph M. Griffin, for Lester H. Yandle, Jr., and Mary H. Yandle, plaintiffs, appellees, and defendants, appellants.

Taylor and Buckley, by Charles R. Buckley III, for Town of Matthews, defendant, appellant.

HEDRICK, Chief Judge.

Preliminary injunctions are nonappealable interlocutory orders unless the appellant shows that a substantial right will be irrevocably lost if the injunction is not immediately reviewed. *State v. School*, 299 N.C. 351, 261 S.E. 2d 908, *aff'd on rehearing*, 299 N.C. 731, 265 S.E. 2d 387 (1980).

In the record before us, there is no evidence indicating that either the Town of Matthews or Mecklenburg County will be irrevocably harmed if the status quo in this case is preserved until a final hearing can be held. The arguments raised on appeal by Mecklenburg County and the Town of Matthews must await final resolution by the trial court where all the facts can be fully developed. *Id.*

However, that portion of the order entered 31 December 1984 which enjoins Mr. and Mrs. Yandle from "taking any action whatsoever that would affect directly or indirectly the status of the title to the property" is beyond the authority of the trial court. No party requested this order. Although a court may issue injunctions as a remedy subsidiary to and in aid of another action, such relief must be reasonably necessary to protect a party's rights. *Edmonds v. Hall*, 236 N.C. 153, 72 S.E. 2d 221 (1952). There is no evidence in the record before us to justify enjoining the Yandles from exercising their right to convey their property.

For the reasons set forth above, these appeals are dismissed except that the portion of the injunction orders regarding the Yandles' power to convey their property is vacated.

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Dismissed in part, vacated in part and remanded.

Judges EAGLES and MARTIN concur.

STATE OF NORTH CAROLINA v. JEROME MITCHELL

No. 8527SC477

(Filed 5 November 1985)

1. Kidnapping § 1.2— kidnapping to facilitate felony or flight—evidence sufficient

There was sufficient evidence to support defendant's conviction for second degree kidnapping where the State's evidence would allow the jury to find that a store owner was restrained by defendant to facilitate the taking of his wallet contents against his will by violence or by putting him in fear, and that the store owner was restrained to facilitate defendant's flight following commission of the felony. G.S. 14-39 (Cum. Supp. 1983).

2. Kidnapping § 1.3— instruction on terrorizing—indictment based on facilitating felony or flight—new trial

Defendant was entitled to a new trial for kidnapping under the plain error rule where the indictment alleged that a store owner was restrained for the purpose of facilitating the commission of a felony or facilitating flight under G.S. 14-39(a)(2), and the court instructed the jury on terrorizing under G.S. 14-39(a)(3).

APPEAL by defendant from *Friday, Judge*. Judgment entered 3 October 1984 in LINCOLN County Superior Court. Heard in the Court of Appeals 23 October 1985.

Defendant was convicted of common law robbery, malicious throwing of acid, and second degree kidnapping. At trial, the State's evidence tended to show the following circumstances and events.

On 20 January 1984, three men, including defendant, entered Bill Spake's antique shop. Following a brief conversation, Spake was attacked by two of the men, defendant telling the others to hit Spake. After Spake was struck and fell to the floor, his pockets were emptied and he was bound hand and foot and his mouth was taped. Acid was then poured onto Spake's face.

Defendant testified, denying involvement and presenting alibi evidence.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas B. Wood, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Louis D. Bilionis, for defendant appellant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends that his conviction of second degree kidnapping cannot stand because there was insufficient evidence to support it. Under the provisions of N.C. Gen. Stat. § 14-39 (Cum. Supp. 1983), a kidnapping must have as one of its essential elements a specified unlawful purpose. Defendant was charged with restraining Spake for the purpose of facilitating the commission of a felony or facilitating flight following the commission of a felony, the elements set forth in G.S. 14-39(a)(2). The State's evidence at trial would allow the jury to find that Spake was restrained by defendant in order to facilitate defendant's taking of Spake's wallet contents against Spake's will, by violence or putting him in fear, which constitutes the felony of common law robbery, *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971), and that Spake was restrained by defendant in order to facilitate defendant's flight following the commission of this felony. This assignment is overruled.

[2] In his second assignment, defendant contends that he is entitled to a new trial on the kidnapping charge because the trial court instructed the jury on terrorizing, under G.S. 14-39(a)(3), while the indictment alleged that Spake was restrained for the purpose of facilitating the commission of a felony or facilitating the flight of any person following the commission of a felony, under G.S. 14-39(a)(2). We agree and award a new trial on this charge.

In *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984), involving a similar variance in a kidnapping indictment and the jury instruction, our Supreme Court held that a new trial was required. As in this case, the defendant in *Brown* did not object at trial to the instruction on terrorizing, but the Court held that the "plain error" rule adopted in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) was applicable to allow consideration of such an asserted error. While we view *Brown* as a significant extension and liberalization of the "plain error" standards set out in *Odom*,

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we conclude that *Brown* requires us to grant a new trial on the kidnapping charge in this case.

We have carefully examined defendant's additional assignment of error, find it to be entirely without error and therefore overrule it.

The results are:

In case no. 84CRS575,

No error.

In case no. 84CRS1606,

No error.

In case no. 84CRS4104,

New trial.

Judges ARNOLD and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 29 OCTOBER 1985

CAPEL v. REED No. 8420SC1327	Anson (81CVS238)	No Error
IN RE HICKS No. 8526DC135	Mecklenburg (83J313)	Affirmed
STATE v. HARRIS No. 8518SC183	Guilford (84CRS30086)	No Error
STATE v. HOLDER No. 8515SC214	Chatham (83CRS5292)	No Error
STATE v. JONES No. 8528DC274	Buncombe (84CRS13502)	No Error
STATE v. RAMIREZ No. 8518SC123	Guilford (84CRS21857)	No Error
STATE v. THOMPSON No. 8526SC357	Mecklenburg (82CRS75523) (82CRS75723) (82CRS75866)	Remanded for resentencing
STATE v. WATSON No. 8511SC225	Johnston (80CR0873) (80CR0874)	No Error
STATE v. WESTLEY No. 846SC1319	Bertie (83CRS3269)	No Error

FILED 5 NOVEMBER 1985

BARNHILL v. BARNHILL No. 855DC361	New Hanover (84CVD1203)	Affirmed
HEWITT v. GRAY No. 851SC332	Dare (84CVS177)	Affirmed
STATE v. FLEMBESTER No. 8515SC290	Orange (84CRS4174)	No Error
STATE v. ROLLA No. 854SC10	Onslow (84CRS8300) (84CRS8301)	No Error
WORLEY v. WORLEY No. 8511DC441	Johnston (84CVD583)	Dismissed

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JOHN P. DORTON v. BETTY B. DORTON

No. 8514DC75

(Filed 19 November 1985)

1. Divorce and Alimony § 30— equitable distribution—dental license as separate property

The trial court should have identified plaintiff's dental license as separate property and should have considered it as one of the factors affecting equitable distribution. G.S. 50-20(b)(2); G.S. 50-20(c)(1).

2. Divorce and Alimony § 30— equitable distribution—family corporation—disregard of corporate entity—noncompliance with corporate formalities

The trial court could not properly disregard the corporate entity of a family corporation in favor of plaintiff husband for equitable distribution purposes because of noncompliance with corporate formalities where plaintiff acquiesced in the formation of the corporation, knew what property belonged to the parties in their individual capacities and what property belonged to their corporation, and shared in the duty to observe corporate formalities as a corporate director, officer and shareholder.

3. Divorce and Alimony § 30— equitable distribution—family corporation—disregard of corporate entity—factors properly considered

In determining whether to disregard the corporate entity of a family corporation in favor of plaintiff husband for equitable distribution purposes on the ground of defendant's domination of the corporation to the detriment of plaintiff, the trial court could properly consider defendant's lack of accountability and defendant's mismanagement of corporate property by allowing it to deteriorate and not realizing its full rental potential. However, the evidence was insufficient to support findings by the court that one piece of property owned by the corporation had been sold by defendant to her mother at a foreclosure sale for less than its fair market value and that defendant fraudulently caused the corporation to issue two notes and deeds of trust to her mother. Therefore, the cause is remanded for a new hearing and consideration of whether to disregard the corporate entity based on relevant factors properly supported by the evidence.

4. Divorce and Alimony § 30— equitable distribution—dental practice as marital property

The trial court erred in failing to identify and treat plaintiff husband's dental practice, including its goodwill component, as marital property for equitable distribution purposes. The trial court has the authority under G.S. 8C-1, Rule 706 to appoint an expert witness to appraise the goodwill and other value of plaintiff's practice.

5. Divorce and Alimony § 30— equitable distribution—improper change of child support

The trial court erred in altering a writ of possession of the family home as child support in its equitable distribution judgment since a child support order

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may be modified or vacated only after an equitable distribution, G.S. 50-20(f), and only after a finding of changed circumstances, G.S. 50-13.7.

6. Divorce and Alimony § 30— equitable distribution—marital fault not considered

The record did not show that the trial court considered marital fault as a factor in distributing marital property although the court read the pleadings in a companion case in which the complaint alleged fault on defendant's part as a basis for divorce.

7. Divorce and Alimony § 30— equitable distribution—work outside home and child-rearing by one spouse

Under G.S. 50-20(c)(12) it was within the trial court's equitable powers in distributing marital property to consider that one spouse worked outside the home *and* participated in child-rearing and homekeeping while the other spouse only participated in child-rearing and homekeeping.

8. Divorce and Alimony § 30— equitable distribution—requiring wife to furnish information for taxes

A provision of an equitable distribution judgment ordering defendant wife "to cooperate immediately in the furnishing of information and filing of tax returns for 1981 and 1982" only required defendant to provide all information she has that will assist plaintiff in filing his 1981 and 1982 tax returns and does not improperly require defendant to file joint returns with plaintiff.

9. Divorce and Alimony § 30— equitable distribution—sale of marital home—forbidding commission by either party

The trial court had authority under G.S. 50-20(c)(12) to forbid either party to its equitable distribution order from receiving a commission or broker's fee on the sale of the marital home.

APPEAL by defendant from *LaBarre, Judge*. Judgment entered 6 September 1984 in District Court, DURHAM County. Heard in the Court of Appeals 17 September 1985.

Plaintiff and defendant were married to each other in 1955. Five children were born of the marriage, one of whom is still a minor. The parties separated on 10 March 1982. The trial court entered an order in plaintiff's civil action number 82CVD01464 on 24 September 1982 which (1) denied defendant's claim for alimony pendente lite, (2) gave primary custody of the two then minor children to defendant, (3) granted a writ of possession in the family residence to the two minor children, and (4) required plaintiff to pay health insurance for the minor children, child support, and the mortgage payments on the family residence. In response to motions in the cause after one of the children became emancipated, the trial court on 14 October 1983 reduced plaintiff's child sup-

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port obligations and continued a writ of possession in the family residence for the remaining minor child until she should reach the age of 18.

Plaintiff also filed civil action number 83CVD01436 in which he sought an absolute divorce and equitable distribution of the marital property. The trial court entered judgment of absolute divorce based on one year's separation on 17 August 1983. The two civil actions were consolidated by stipulation of the parties, and on 6 September 1984 the trial court entered the equitable distribution order which is the subject of this appeal by defendant.

Mount, White, King, Hutson & Carden, by Elizabeth R. Stuckey and William O. King, for plaintiff appellee.

Susan H. Lewis for defendant appellant.

WEBB, Judge.

Defendant challenges the trial court's findings and conclusions in sixteen questions presented on appeal. We vacate the judgment and remand the cause for a new hearing on equitable distribution due to the errors discussed below. In all fairness to the trial court we note that it did not have the benefit at the time judgment was entered of much of the case law on equitable distribution.

The trial court must identify the property owned, evaluate it, and order its distribution in an equitable distribution action pursuant to G.S. 50-20. *Capps v. Capps*, 69 N.C. App. 755, 318 S.E. 2d 346 (1984). The findings indicate that the parties acquired during their marriage the following holdings: (1) rental property at 823 Buchanan Boulevard in Durham, (2) lots 17 and 18 in Willowhaven subdivision, (3) lot 14 in Willowhaven subdivision, (4) lot 16 in Willowhaven subdivision, (5) an Emerald Isle beach house, (6) rental property at 201 Albemarle Street in Durham, (7) the family residence in Willowhaven subdivision, (8) an office building at 1306 Broad Street in Durham, (9) personal property in the family residence, (10) personal property in the beach house, (11) office equipment in the Broad Street office, and (12) a vacant lot on Buchanan Boulevard. The parties had transferred the beach property, Willowhaven lots 17 and 18, and the Albemarle and both Buchanan properties to a family corporation formed in 1981 and

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known as B J & K Investments, Ltd. The trial court concluded that all of the aforementioned property was marital property, except for the vacant lot on Buchanan Boulevard which had been sold, and it found and concluded that neither party owned separate property.

[1] The finding and conclusion that neither party owned separate property constitutes error on the face of the record which we point out, despite the lack of an exception by either party, to guide the trial court upon remand. The evidence shows that plaintiff was a practicing dentist. G.S. 50-20(b)(2) classifies professional licenses as separate property. G.S. 50-20(c)(1) requires the trial court to consider the property of each party when making a property division. Thus the trial court must identify plaintiff's dental license as separate property. *Poore v. Poore*, 75 N.C. App. 414, 423-24, 331 S.E. 2d 266, 272-73 (1985). The trial court then must consider the dental license as one of the factors affecting equitable distribution. *Id.*

In the course of identifying and distributing the marital property, the trial court disregarded the corporate entity of B J & K Investments on the grounds that the corporation was a "sham." The trial court then distributed the assets of the corporation as marital property, but held defendant personally liable for \$23,000 worth of notes and deeds of trust she had executed, apparently in the name of the corporation, after the parties separated. This part of the judgment constitutes reversible error because several of the reasons cited by the trial court for disregarding the corporate entity are unsupported by the evidence or are irrelevant.

As R. Robinson, *North Carolina Corporation Law and Practice*, § 2-12 (3d ed. 1983), observes,

Disregarding the corporate entity is an equitable remedy imposed in a particular case only to prevent or rectify an abuse of the corporate privilege or to avoid some other injustice. The remedy is exercised reluctantly and cautiously, and the burden of establishing a basis for invoking it rests on the party asserting the claim.

Robinson identifies four principal factors that support a decision to disregard a corporate entity: (1) inadequate capitalization; (2) noncompliance with corporate formalities; (3) complete domination

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and control of the corporation so that it has no independent identity; and (4) excessive fragmentation of a single enterprise into separate corporations. *Id.* Other factors may exist, depending on the facts of the case. See *Glenn v. Wagner*, 313 N.C. 450, 458, 329 S.E. 2d 326, 332 (1985); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F. 2d 681 (4th Cir. 1976). The trial court's findings in the present case relate to Robinson's second and third factors.

[2] With regard to noncompliance with corporate formalities, the trial court found that defendant never issued any stock, never paid any franchise tax, never filed a corporate tax return, and held only one meeting during the existence of the corporation. Defendant was the president, a director, and 51% shareholder or owner of B J & K Investments, Ltd. Plaintiff was a director, vice president, and 40% shareholder. Their daughter Katina was secretary and 9% shareholder until 22 February 1984, when she resigned from the corporation and gave her ownership interest in equal parts to her parents.

We fail to see how noncompliance with the corporate formalities mentioned above could justify disregarding the corporate entity in favor of plaintiff. Plaintiff acquiesced in the formation of the corporation. He knew what property belonged to the parties in their individual capacities and what property belonged to their corporation. As a director, officer, and shareholder he bore responsibility for observance of corporate formalities along with defendant. The present case is thus distinguishable from the more typical situation where a person unassociated with a corporation and unaware of its existence may hold an agent of the corporation individually liable on the grounds that the plaintiff was led to believe he was dealing with the agent in an individual capacity rather than in a corporate capacity due to the noncompliance with corporate formalities. See, e.g., *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E. 2d 518 (1981). *Equipment Co. v. DeBruhl*, 28 N.C. App. 330, 220 S.E. 2d 867, *disc. review denied*, 289 N.C. 451, 223 S.E. 2d 160 (1976), presents a more analogous situation. In *Equipment Co.* plaintiff knew or should have known that defendant was acting as president of his corporation. This Court held that it would not disregard the corporate entity for non-compliance with corporate formalities:

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Furthermore, we do not see merit in plaintiff's contention that LaFayette Transportation Service is merely defendant's alter ego. Plaintiff's evidence establishes that defendant's den is the corporate office, that defendant has not read the corporate by-laws, and that he is not familiar with the corporation's tax matters. This is not sufficient evidence to show that the corporation was "ignored as a separate entity," and it is insufficient to apply the alter ego doctrine and hold defendant personally liable.

Id. at 333, 220 S.E. 2d at 869. Plaintiff in the present case not only knew of the existence of the corporation, he shared in the duty to observe corporate formalities. He could not have been deceived by the noncompliance with formalities, so the noncompliance with corporate formalities is irrelevant in this case. Plaintiff will not be allowed to disregard the corporate entity on that basis.

[3] The trial court's findings also refer to several instances of mismanagement and fraudulent activity by defendant as a basis for disregarding the corporate entity. These findings are best categorized under the "principal factor" identified in *Robinson, supra*, as "complete domination and control of the corporation so that it has no independent identity." The North Carolina Supreme Court has provided a broad rule applicable to this factor:

[W]hen . . . the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person. . . . (Citations omitted.)

Henderson v. Finance Co., 273 N.C. 253, 260, 160 S.E. 2d 39, 44 (1968). Such a drastic remedy should be invoked only in an extreme case where necessary to serve the ends of justice. *Robinson, supra*.

As one example of defendant's domination through mismanagement, the trial court found that defendant had not fulfilled her fiduciary obligations with respect to accountability. The record is replete with evidence to support this finding. Generally, a lack of accountability to other shareholders would not, by itself, be suffi-

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cient grounds to pierce the corporate veil. G.S. 55-37 and 55-38 provide an adequate remedy at law to enforce accountability, so the court need not resort to the more drastic equitable remedy of denying the existence of the corporation. However, the trial court was entitled to weigh defendant's lack of accountability in conjunction with other evidence of defendant's complete domination and control of the corporation.

The trial court also found that defendant mismanaged corporate property by allowing it to deteriorate and not realizing the full rental potential from it. Again, the trial court properly considered this as one of several factors demonstrating defendant's domination of the corporation to the detriment of plaintiff as a minority shareholder, although it is questionable whether this finding alone could justify piercing the corporate veil in equity since less drastic remedies are available at law under G.S. 55-125.1.

The trial court further found that, "Another piece of property on Buchanan Boulevard which had been acquired by the parties was somehow sold to the defendant's mother for less than its fair market value without any authority whatsoever from plaintiff, either individually or as a principal of the corporation." Presumably this piece of property had belonged to the corporation and was sold by defendant. Evidence in the record indicates this property was located at 811 Buchanan Boulevard, that it was sold to defendant's mother at a foreclosure proceeding for \$7,500, and that it was worth between \$12,000 and \$16,000. Neither this evidence nor the finding quoted above support the trial court's decision to disregard the corporate entity. Nothing in the record shows that the sale was commercially unreasonable, that there was an usurpation of corporate opportunity, or that there was any overreaching on defendant's part.

As a basis for declaring the corporation a sham, the trial court also found,

[D]efendant fraudulently caused the corporation to issue a note and deed of trust for \$15,000.00 against the beach property to her mother. She also caused the fraudulent issuance of a note and deed of trust to her mother for \$8,000.00 against the Albemarle Street property. In both instances, the deeds of trust evidencing the indebtedness were signed by a

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Gail Wheeler. Gail Wheeler is a legal secretary who has never been an officer of BJK Corporation and has never had any interest of any nature whatsoever in said corporation. Neither of said transactions was authorized by the plaintiff or other officer of the so-called corporation, and both transactions were conducted entirely by defendant.

This finding is not supported by the evidence. No evidence appears in the record to show that the notes and deeds of trust defrauded the corporation or plaintiff. Plaintiff has not presented any evidence that the loan proceeds were diverted for improper purposes, that corporate assets were encumbered without good reason, or that the notes and deeds of trust in any way harmed the corporation. We also note for purposes of remand that the issue of defendant's authority to execute the notes and deeds of trust on behalf of the corporation may depend on the bylaws or the business practice of the corporation. See G.S. 55-34(b); *Tuttle v. Building Corp.*, 228 N.C. 507, 512, 46 S.E. 2d 313, 317 (1948).

In sum, several of the reasons relied upon by the trial court to declare the corporation a sham were not supported by the evidence, or were not relevant. Other reasons were supported by the evidence. The cause is remanded for a new hearing and consideration of whether to disregard the corporate entity based on all the relevant factors properly supported by the evidence. In reconsidering this issue the trial court should determine whether defendant's domination of the corporation facilitated wrongful acts which were detrimental to plaintiff, and which can only be corrected by making defendant liable in equity for the notes and deeds of trust she executed in the corporation's name. The North Carolina Supreme Court has recently provided the following guidance on such matters: "[C]ourts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner, supra*, at 454, 329 S.E. 2d at 330 (1985). Furthermore,

It should be remembered that the theory of liability under the instrumentality rule is an equitable doctrine. Its purpose is to place the burden of the loss upon the party who should be responsible. Focus is upon reality, not form, upon the operation of the corporation, and upon the defendant's re-

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lationship to that operation. It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, suggest that the corporate entity attacked had "no separate mind, will or existence of its own" and was therefore the "mere instrumentality or tool" of the dominant [shareholder].

Id. at 458, 329 S.E. 2d at 332. "Each case will be treated as *sui generis* with the burden on the plaintiff to establish the existence of factors that would justify disregarding the corporate entity." *Id.* at 459, 329 S.E. 2d at 333. "Since the issue is one of fact, the trial court should take pains to spell out in its instructions [or findings] the specific factors to be considered in determining whether the corporate entity should be disregarded." *Id.*

If the trial court finds that the corporate entity must be disregarded, the real property belonging to the corporation will still be marital property since it was acquired by the parties during their marriage. G.S. 50-20(b)(1). The corporation may nonetheless remain liable to defendant's mother on the notes and deeds of trust executed by defendant in the name of the corporation after the parties separated if defendant's mother is an innocent third party creditor and the provisions of G.S. 55-36(e) apply. See *American Clipper Corp. v. Howerton*, 311 N.C. 151, 168-69, 316 S.E. 186, 195-96 (1984). If defendant is determined to be individually liable for the notes and deeds of trust, then defendant's one-half undivided interest in the property after divorce but before equitable distribution would be subject to the liens of the deeds of trust. *Branch Banking and Trust Co. v. Wright*, 74 N.C. App. 550, 328 S.E. 2d 840 (1985).

If the corporate entity is not disregarded, then the ownership interest of each party in the corporation would be marital property subject to equitable distribution. Because equitable distribution must be based on the net value of the parties' ownership interests at the time of separation, G.S. 50-21(b) and *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984), the encumbrances on the Albemarle Street property and the beach property would have to be accounted for as an additional equitable factor under G.S. 50-20(c)(12).

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With respect to the notes and deeds of trust issued by defendant in the corporation's name to defendant's mother, the trial court's finding that they are null and void and its conclusion that they must be cancelled are error. Defendant's mother was not a party to this action, and the trial court cannot deprive her of rights as a creditor without affording her the due process rights to notice and an opportunity to be heard.

[4] Defendant contends the trial court erred in not identifying and treating plaintiff's dental practice as marital property. We agree. The office building and equipment used by plaintiff in his dental practice were accounted for in the judgment, but there was no finding as to the value of the intangible aspects of the practice. This Court recently held that "goodwill is an asset that must be valued and considered in determining the value of a professional practice for purposes of equitable distribution." *Poore v. Poore*, *supra*, at 420-21, 331 S.E. 2d at 271. The dental practice, including its goodwill component, must be valued as of the date of separation of the parties since this action was pending after the effective date of the amended version of G.S. 50-21(b), and the trial court may use any reasonable valuation method supported by the evidence since there is no single correct way to value a professional practice. *Poore*, *supra*; *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985). Plaintiff's testimony, as summarized in the record, is inconclusive as to the value of his practice:

Regarding the goodwill value of my professional practice, if I would sell my dental practice to another dentist coming into the practice, I don't know, I doubt if anybody would buy it right now. I don't have a patient list for somebody to buy hoping that they would keep half of them. I really don't know.

However, there was evidence as to the recent earning history of the dental practice, and plaintiff's age, health, and professional experience. Moreover, the trial court has the authority under G.S. 8C-1, Rule 706 to appoint an expert witness to appraise the goodwill and other value of plaintiff's practice. Use of G.S. 8C-1, Rule 706 may be necessary in this type of case since the trial court must value the goodwill of a professional practice for purposes of equitable distribution, and valuation of goodwill "should be made

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with the aid of expert testimony." *Poore, supra*, at 421, 331 S.E. 2d at 271.

[5] Defendant contends the trial court erred in dissolving a "writ of sequestration" in the parties' marital home. In the 14 October 1983 order the trial court had granted a writ of possession in the family residence to the parties' minor child until age 18. The equitable distribution order of 6 September 1984 terminated the writ of possession on the basis of the following finding of fact:

The Willowhaven home in which defendant and one 14-year-old child reside under a writ of possession, has 4,400 square feet. The monthly payments on the home are over \$1,000.00. The date of separation equity in the home was \$105,949.46, and the present equity is \$116,501.27. It is neither reasonable nor feasible that this property continue to be tied up under a writ possession for four more years for the benefit of one minor child.

The evidence does not support this finding with respect to the amount of the monthly house payment: plaintiff testified that the payment was \$546 per month, while defendant introduced evidence that it was \$568. Even if the \$143 per month for taxes and insurance is added to these figures, they bear no reasonable relation to the \$1,000 per month finding of the trial court.

More importantly, the trial court erred in altering the child support provision of a previous order in its equitable distribution judgment. The writ of possession was a child support provision intended to benefit the parties' minor child. A child support order may be modified or vacated only *after* an equitable distribution. G.S. 50-20(f); *Capps v. Capps*, 69 N.C. App. 755, 318 S.E. 2d 346 (1984). Modification of child support must be vacated and remanded where, as here, it is part of the equitable distribution judgment and thus appears to have been decided and entered at the same time as equitable distribution, rather than after equitable distribution as required by G.S. 50-20(f).

Finally, G.S. 50-20(f) provides that an order for child support, such as the writ of possession in the present case, may be modified or vacated after an equitable distribution *pursuant to* G.S. 50-13.7. G.S. 50-13.7 requires that there be a substantial change of circumstances before a child support order may be modified. The

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judgment terminating the writ of possession is not supported by any findings as to a change of circumstances, and therefore must be vacated.

Defendant next contends that the trial court erred in dividing the marital property without considering and assigning liability for all the parties' marital debts. G.S. 50-20(c)(1) states that the court shall consider the liabilities of each party when making an equitable distribution. Without deciding whether the trial court erred in not finding certain liabilities of defendant, we note for purposes of remand that credible evidence of each party's liabilities "at the time the division of property is to become effective" must be reflected in the findings and property distribution.

Defendant assigns error to the trial court's decision holding her responsible for the \$23,000 debt on the notes and deeds of trust to her mother, to the unfairness of the division of the parties' marital property, and to the form of the judgment. We do not address these issues since they are unlikely to arise in the same manner on remand.

[6] Defendant contends the trial court improperly considered marital fault because one finding states that the trial court considered the pleadings, including a complaint in a companion case that alleged fault on defendant's part as a basis for divorce. We find no error. The parties stipulated that the cases could be consolidated, so the pleadings were properly before the trial court. The fact that it read the pleadings alleging marital fault in no way means that it found that allegation credible or relied upon it. Nothing in the findings or conclusions, and no comment by the trial court in the record, indicates that it relied upon marital fault as a factor in distributing the marital property.

[7] Defendant excepted to the following finding:

Throughout the marriage, each of the parties participated in both the rearing of the family and the keeping of the home. Plaintiff's participation in child-rearing and home-keeping was in addition to his efforts in the practice of dentistry which led to the acquisition of practically all of the marital assets.

Defendant maintains that this finding erroneously credits plaintiff with providing the marital property when in fact the earnings

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from his dental practice, with which the parties obtained their property, were themselves marital property. This argument misconstrues the finding. The finding, which is supported by evidence in the record, focuses on plaintiff's greater contributions to the marriage. Under G.S. 50-20(c)(12) it is certainly within the trial court's equitable powers to consider that one spouse worked outside the home *and* participated in child-rearing and homekeeping while the other spouse *only* participated in child-rearing and homekeeping. *See also* G.S. 50-20(c)(6), which requires the trial court to consider such efforts by a spouse when title to marital property is not in that spouse's name.

[8] Defendant objects to the part of the judgment ordering her "to cooperate immediately in the furnishing of information and filing of tax returns for 1981 and 1982." She claims the trial court cannot force her to sign a joint return with plaintiff. She also argues that the findings to the effect that plaintiff's tax burden has been increased by her failure to provide information about the family corporation are not based on competent evidence. We disagree. First of all, we interpret the trial court's order to mean that defendant must provide all information she has that will assist plaintiff in filing his 1981 and 1982 tax returns, but not that defendant must file a joint return with plaintiff. Second, there is sufficient competent testimony from plaintiff to support the findings that defendant's refusal to share certain accounting information has prevented plaintiff from reducing his tax liability.

[9] Defendant lastly contends that the trial court erred in forbidding either party from receiving a commission or broker's fee on the sale of the marital home. This order is directed primarily at defendant since she is a licensed real estate broker. We find no error in this part of the judgment. If the parties can sell the home by themselves, without paying a real estate commission, then the net proceeds of sale will be greater and there will be more marital property for equitable distribution. This is an equitable factor that the trial court may consider under G.S. 50-20(c)(12).

Remanded for further proceedings consistent with this opinion.

Judges BECTON and MARTIN concur.

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ALEXANDER P. SABOL AND PEGGY W. SABOL v. PARRISH REALTY OF ZEBULON, INC., A NORTH CAROLINA CORPORATION, AND RALPH MCCOIG, JR.

No. 859SC107

(Filed 19 November 1985)

Brokers and Factors § 4.1— real estate agency—damage to vacant house—insufficient evidence of agency's negligence

In an action for negligence and breach of contract arising from water damage to a vacant house listed with a real estate agency, the issue of the agency's negligence should not have been submitted to the jury where the evidence showed that when plaintiffs left their house on 9 August 1982 a bleed valve on the second floor was closed, the well pump and all of the circuit breakers were off, and the doors of the house were locked; plaintiff husband entered the house on 18 August and the house appeared all right; plaintiff husband did not open the bleed valve, turn on the pump or any circuit breakers, and locked the door when he left; the only key to the house not in plaintiffs' possession was in the possession of defendant; there was no evidence of forceful entry or vandalism; several of defendant's agents admitted they were in the house with other agents, a prospective purchaser, or guests; the water damage to the house could not have occurred unless someone entered the house, used the water, opened the bleed valve, turned on the breaker switch for the pump, entered the well house, and manually activated the safety switch on the pump; and one of the exterior panels in the well house was sufficiently loose for someone to crawl in without unlocking the door. There was no direct evidence showing that any agent of defendant did any of the acts necessary to cause the damage to plaintiffs' house; the activation of the switch in the well house could have been done by someone other than an agent of defendant; and there was no evidence that any agent of defendant failed to exercise proper care.

Judge PHILLIPS dissenting.

APPEAL by defendant Parrish Realty of Zebulon, Inc., from *Hobgood, Judge*. Judgment entered 1 August 1984 in FRANKLIN County Superior Court. Heard in the Court of Appeals 17 September 1985.

Plaintiffs instituted this civil action seeking to recover, among other relief, damages arising from the alleged negligence of defendants. Plaintiffs also set forth in their complaint claims for relief based on breach of contract and unfair and deceptive practices.

The record tends to show the following facts: Plaintiff husband is a retired aeronautical research scientist and has degrees

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in both aeronautical engineering and mechanical engineering. Between 1976 and 1980, he designed and, with the assistance of his wife, built a house on property owned by them in Franklin County. On 23 July 1982, plaintiffs granted the defendant realty company (Parrish Realty) the exclusive right to sell their property for the next 120 days. At that time plaintiff husband gave a key to the house to defendant McCoig, a real estate broker employed by Parrish Realty, and kept the remaining keys to the house. Parrish Realty placed a lock box on the door of plaintiffs' house and listed the property with the Multiple Listing Service. Parrish Realty admitted prior to trial, however, that no members of the Multiple Listing Service other than Parrish's employees entered plaintiffs' property during the relevant time period. On the evening of 20 August 1982, it was discovered that plaintiffs' house had been badly damaged by water escaping from a bleed valve located on its second floor.

Plaintiff husband testified as follows about the house's water system: To protect the pipes during cold weather, he designed the water system so that it could be completely drained. To facilitate draining the pipes, he installed a bleed valve on the second floor of the house at the highest point in the water system. This valve remained closed during normal operation of the system. As an additional safety measure, a pressure switch on the pump inside the well house turned off the pump when the pressure in the holding tank fell below ten pounds per square inch, thereby guarding against flooding of the house in the event a pipe broke. Once the electricity to the pump was cut off and the pressure in the tank fell below ten pounds per square inch, the pump would not restart without manually activating the safety switch. The well house was locked; however, one of its exterior panels was sufficiently loose for someone to crawl in without unlocking the door.

Plaintiff husband testified that someone must have done the following five things in sequence in order to cause the flooding which occurred in his house on 20 August 1982: (1) entered the house, (2) used the water in the house so that the pressure in the holding tank dropped below ten pounds per square inch, (3) opened the bleed valve, (4) turned on the breaker switch in the house for the well pump, and (5) entered the well house and manually activated the safety switch on the pump. Plaintiff husband last operated the water system on 9 August 1982 when he

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and his wife cleaned the house. He testified that the bleed valve was closed on that date and that before he left the property that day he turned off the well pump and checked to make sure that all the circuit breakers were off. He was also in the house on 18 August 1982 at which time he checked to see that everything was all right. He did not turn on the water or touch the electrical system while he was there and locked the door when he left. He came on the property again on 20 August 1982 between 2 and 3 p.m. and parked his truck between the residence and the well house. He turned off the motor of the truck and did not hear the well pump running. He left without getting out of his truck.

After plaintiffs listed their property with Parrish Realty, the brokers employed by Parrish Realty visited the property for a short staff meeting. One of the brokers testified that during the staff meeting he did not see anyone use the water or toilet in the house or turn the bleed valve, and that no one opened the electrical panel box. Another broker, William Parrish, testified that he was on the property shortly after it was listed and that he did not at that time turn on any lights or use any water or the toilet. He further stated that he did not go in the well house when he was at the staff tour.

Marty Clark, a broker with Parrish Realty, testified to showing the property to a client on 18 August 1982, at which time they turned on no water, valves or electrical breakers and did not enter the well house.

William Green, another broker employed by Parrish Realty, testified that he showed plaintiffs' property to a client and three of the client's relatives on the afternoon of 18 August 1982, that they went in the house and stayed for 30-40 minutes, and that he locked the door when they left. He said that during the visit no one opened the panel box or the bleed valve, flipped any switches or went in the well house. Green returned to the property with the client the morning of 20 August but neither he nor the client entered the residence or the well house.

Defendant McCoig testified that he and a client, Raymond Beck, went in the residence on the evening of 19 August 1982 to take some measurements. Since it was dark, he and Beck went to the second floor of the house, located the panel box with the breaker switches and, with the aid of a flashlight, found the light

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switch and turned it on. After they finished in the house, they turned off the light switch and locked both doors of the house. McCoig testified that only he, not Beck, touched the panel box and the switches and that he was with Beck at all times during the visit. He said that when they left the property all the switches in the panel box were in the off position. He further stated that during the visit neither he nor Beck went in the well house, drank any water, used the toilet, drank beer as alleged by plaintiffs or turned on any switches other than the light switch. McCoig testified that plaintiff husband had previously explained to him the purpose of the bleed valve, that he never touched the bleed valve during any of his visits to the property and that he never turned on the switch to the well house. Beck testified consistently with McCoig regarding what he and McCoig did on plaintiffs' property on 19 August 1982.

On the afternoon of 20 August 1982, Beck called McCoig and asked if he could inspect the grounds of plaintiffs' property since it had been dark the previous night. McCoig testified that he did not give Beck a key to the house nor did Beck ask for permission to go inside the house. Beck testified that he returned to plaintiffs' property about 7 p.m. on 20 August 1982 while it was still light and began an inspection of the grounds. He noticed that part of the foundation of the house looked damp so he approached the house to investigate. He discovered that the house had been badly damaged by water flooding out of a hole on its second floor. He then left the property and informed McCoig of the damage.

Defendants moved at trial for directed verdicts on all claims asserted by plaintiffs. The court granted the motion with respect to plaintiffs' unfair and deceptive practices claim but denied it with respect to plaintiffs' breach of contract and negligence claims. The jury returned a verdict finding that plaintiffs' property was damaged by the negligence of Parrish Realty, but not by any negligence on the part of McCoig, and that plaintiffs were entitled to recover \$5000 from Parrish Realty for such negligence. The jury further found in favor of plaintiffs on their breach of contract claim and awarded them nominal damages. Parrish Realty moved for judgment notwithstanding the verdict and for a new trial. The court denied the motions and entered judgment in accordance with the verdict. Parrish Realty appealed.

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Larry E. Norman for plaintiffs.

Smith, Debnam, Hibbert & Pahl, by W. Thurston Debnam, Jr. and Jerry Talmadge Myers, for defendant Parrish Realty of Zebulon, Inc.

WELLS, Judge.

Parrish Realty argues that the court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict on the issue of its negligence because plaintiffs failed to prove that Parrish Realty or any of its agents committed the acts which were the proximate cause of plaintiffs' damages. In ruling on a defendant's motions for a directed verdict and judgment notwithstanding the verdict, the court must take the evidence in favor of the plaintiff as true, resolve any conflicts in the evidence in the plaintiff's favor and give the plaintiff the benefit of every inference which may be reasonably drawn from the evidence. See *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motions should be granted. *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 316 S.E. 2d 256 (1984).

So viewed, the evidence here shows the following: When plaintiffs left their house on 9 August 1982, the bleed valve on the second floor was closed, the well pump and all of the circuit breakers were off and the doors of the house were locked. Plaintiff husband entered the house again on 18 August 1982 but he did not open the bleed valve, turn on the pump or any circuit breakers and locked the door when he left. At that time, everything in the house appeared all right. The damage to plaintiffs' house could not have occurred unless a person or persons entered the house, used the water, opened the bleed valve, turned on the breaker switch for the pump and then went into the well house and manually activated the safety switch on the pump. The last step in the above sequence apparently was done after 2-3 p.m. on 20 August 1982. The only key to the house not in plaintiffs' possession was in the possession of defendant. No evidence was presented which showed that the house had been forcefully entered or vandalized. Several of Parrish Realty's agents admitted that they were in the house after the property was listed,

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and prior to when the damage occurred, either with other agents, a prospective purchaser or guests. Such evidence clearly tends to show that the person or persons who used the water in the house opened the bleed valve and turned on the breaker switch for the pump, gained entry to the house with the key given to Parrish Realty, and was either an agent of Parrish Realty or a prospective purchaser or guest allowed into the house by Parrish Realty but that since the well house could be entered by way of a loose exterior panel, anyone discovering the loose panel could have activated the safety switch on the pump inside.

The question for our determination is whether such evidence is sufficient to take the issue of Parrish Realty's negligence to the jury. We begin by reviewing general principles of negligence. "Negligence is not presumed from the mere fact of injury." *Jackson v. Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540 (1961). To establish actionable negligence, the plaintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and that such breach of duty was a proximate cause of the plaintiff's injury. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984); *Jackson v. Gin Co.*, *supra*. Proper or due care is that care which a reasonably prudent person would exercise under similar circumstances when charged with a like duty. *Electric Co. v. Dennis*, 255 N.C. 64, 120 S.E. 2d 533 (1961); *Bogle v. Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *disc. rev. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976).

Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. [Citations omitted.]

Hairston v. Alexander Tank, *supra*. Proximate cause is an inference of fact to be drawn from other facts and circumstances. *Id.*

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Circumstantial evidence may be used to establish actionable negligence. *Greene v. Nichols*, 274 N.C. 18, 161 S.E. 2d 521 (1968). When the plaintiff relies on such evidence, the issue is one for jury determination only where there is evidence of facts and circumstances from which it may be inferred that the more reasonable probability is that the defendant is guilty of actionable negligence. *Id.* An inference of negligence or of proximate cause, however, cannot rest on mere conjecture or surmise. *Monk v. Flanagan*, 263 N.C. 797, 140 S.E. 2d 414 (1965). "This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof." *Id.* If plaintiff does not offer evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, the issue should not be submitted to the jury. *Jackson v. Gin Co.*, *supra*.

Plaintiff must not only show that the damage *might* have been caused because of the defendant's negligence, but must show by reasonable affirmative evidence that it *did* so originate. See *Phelps v. Winston-Salem*, 272 N.C. 24, 157 S.E. 2d 719 (1967). If all that can be said is that the defendant *may* have done the acts which caused the injury, and it is equally true that defendant may not have, then the evidence is merely conjectural and is not sufficient to go to the jury. *Id.* Similarly, when the facts of the occurrence merely indicate negligence on the part of some person and do not point to the defendant as the only *probable* tortfeasor, the action must be dismissed unless additional evidence is introduced which eliminates negligence on the part of all others who could have caused the injury. *Kekelis v. Machine Works*, 273 N.C. 439, 160 S.E. 2d 320 (1968).

Applying these principles to the present case, we conclude that the evidence, even when viewed in the light most favorable to plaintiffs, is insufficient to support a verdict for plaintiffs on the issue of Parrish Realty's negligence. No direct evidence was presented which shows that any agent of Parrish Realty did any of the acts necessary to cause the damage to plaintiffs' house. Though the circumstantial evidence shows that some of the acts which caused the damage *may* have been done by one or more agents of Parrish Realty or by one or more of the prospective purchasers or guests of Parrish Realty, either purposefully or unwittingly, the final step in the sequence of events resulting in the damage, the activation of the safety switch in the well house,

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could have been done by someone other than an agent of Parrish Realty. Thus, the evidence regarding who did the act which caused the damage is conjectural. See *Phelps v. Winston-Salem*, *supra*.

Moreover, no evidence was presented which shows that any agent of Parrish Realty failed to exercise proper care in showing plaintiffs' property to prospective purchasers or guests or failed to exercise reasonable control over such persons; therefore, the evidence does not support a finding that Parrish Realty was negligent based on the actions of the prospective purchasers or guests. To uphold the judgment against Parrish Realty based on the actions of the prospective purchasers or guests, in the absence of any evidence tending to show that an agent of Parrish Realty failed to exercise proper care in some respect in showing the property to such person or persons, would be tantamount to imposing strict liability on Parrish Realty for the actions of the persons to whom it showed the property. We find nothing in the law or in the contract between the parties which justifies such a result.

It is important to note that the jury found that the damage was not caused by negligence on the part of agent McCoig; therefore, the judgment may only be upheld if the evidence shows that the damage was caused by negligence on the part of some other agent of Parrish Realty. We conclude that no evidence was presented which tends to show beyond mere conjecture or surmise that any agent of Parrish Realty was negligent. Thus, the issue of Parrish Realty's negligence should not have been submitted to the jury and that part of the judgment entered finding in favor of plaintiffs on that issue must be reversed. The remainder of the judgment awarding plaintiffs nominal damages on their breach of contract claim is affirmed.

Reversed in part; affirmed in part.

Judge WHICHARD concurs.

Judge PHILLIPS dissents.

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Judge PHILLIPS dissenting.

In my opinion the evidence presented at trial was sufficient to support the verdict and I vote to uphold the judgment entered on it. Accepting plaintiffs' evidence as true and viewing it in the light most favorable to them it tends to show, in my judgment, that one of defendant's agents was negligent and plaintiffs' house was proximately damaged thereby. In effect, the defendant corporation was the custodian of plaintiffs' house for the purpose of showing it to prospective purchasers; as such its agents had the duty to use due care to avoid damaging the house, either by their own conduct or by that of those who they took into the house. One who activates devices in a strange house, such as a bleed valve and breaker switch, or permits others to do so without knowing what such action might entail and without putting things back as they were, is clearly negligent; and the evidence tends to show, as the majority concedes, that these devices were activated while one of defendant's agents was showing the house to a prospective purchaser. That the bleed valve and breaker switch were both opened while the house was in defendant's custody is proof enough, in my view, that the agent involved either did it, knew about it, or should have known about it, and thus was negligent. To so hold is not tantamount to imposing strict liability duties on the defendant; it is but holding defendant accountable for what it knew or should have known in accord with basic principles of the law of negligence. Since who opened the devices should be known to defendant, but cannot be known by plaintiffs, instead of defendant's professed ignorance and plaintiffs' inability to prove just who opened them being a basis for dismissing the case, it is proof positive, I think, that defendant's agent was either inattentive or untruthful. For nothing in the evidence warrants the assumption that the agent in charge of the house did not or should not have seen that the two devices were activated, as both were located where their use was not likely to be missed by a reasonably observant agent. The bleed valve was in an "access hole" in the hall, about waist high above the water heater, and the breaker switch was in a switch box, also on the second floor.

The old bromide about negligence not being presumed from the "mere fact of injury" has no application, as it so seldom does. The jury did not presume defendant corporation was negligent just because the injury occurred; it presumed it was negligent

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because of the meddlesome and thoughtless things that were done either by its agent or in his presence. That someone else may have entered the well house and took the last step necessary to cause the house to be flooded is immaterial; if the negligent acts in the house had not been committed, the house would not have been damaged.

BRUCE SCHAFFNER, GUARDIAN AD LITEM FOR EUGENIA L. SCHAFFNER, MINOR v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. AND DR. C. G. PANTELAKOS

No. 8512SC76

(Filed 19 November 1985)

1. Negligence § 6— applicability of *res ipsa loquitur*

The doctrine of *res ipsa loquitur* applies and allows the finder of fact to draw an inference of negligence from the circumstances surrounding an injury when (1) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission, (2) direct proof of the cause of the injury is not available, and (3) the instrumentality involved in the accident is under the defendant's control.

2. Negligence § 31— effect of inference created by *res ipsa loquitur*

The inference created by *res ipsa loquitur* will defeat a motion for summary judgment even though the defendant presents evidence tending to establish absence of negligence. The burden of proving negligence, however, remains with the plaintiff, and the finder of fact may reject the permissible inference of negligence even though the defendant presents no evidence.

3. Physicians, Surgeons and Allied Professions § 16— burn on hand during surgery—applicability of *res ipsa loquitur*

In a medical malpractice action against a hospital system and a surgeon to recover for a burn suffered by the minor plaintiff on her hand during surgery to have her adenoids removed and drainage tubes placed in her ears, plaintiff's forecast of evidence was sufficient to invoke the doctrine of *res ipsa loquitur* and thus to survive defendants' motion for summary judgment where a jury, based on common knowledge and experience, could reasonably conclude that the injury sustained was not an inherent risk of the operation and would not ordinarily occur absent negligence; a deposition of defendant surgeon identified the probable source of plaintiff's injury as a hyfrecator that malfunctioned and was replaced during surgery; plaintiff presented evidence that she was anesthetized during surgery and can offer no account of her injury; and plaintiff's evidence tended to show that defendants are in a position of superior knowledge regarding what transpired and, acting in concert, were in control of the only instrumentalities which could have caused plaintiff's injury.

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4. Physicians, Surgeons and Allied Professions § 16— injury to anesthetized plaintiff—inability to identify instrumentality and person in control—applicability of *res ipsa loquitur*

The inability of a plaintiff who was anesthetized during surgery to identify the instrumentality with which her injury was inflicted and a single defendant in exclusive control thereof did not preclude application of *res ipsa loquitur* in her medical malpractice action where defendants were in charge of plaintiff's person and of all instruments in the operating room which could have caused her injury.

5. Physicians, Surgeons and Allied Professions § 16— medical malpractice—application of *res ipsa loquitur* to multiple defendants

The possibility that the negligence of one defendant was the sole cause of plaintiff's injury did not prohibit application of *res ipsa loquitur* to multiple defendants in a medical malpractice action.

6. Physicians, Surgeons and Allied Professions § 16— medical malpractice—breach of duty by defendant surgeon—applicability of *res ipsa loquitur*

Application of *res ipsa loquitur* does not operate to impose liability when defendant does not owe plaintiff a duty of care. However, defendant surgeon clearly had a duty to use reasonable care in his operation of a hyfrecator during surgery on plaintiff, and where plaintiff's injury apparently resulted either from defendant surgeon's negligent use of the hyfrecator or from improper maintenance of the hyfrecator by defendant hospital's agents, or both, plaintiff may rely on *res ipsa loquitur* to create a reasonable inference that defendant surgeon breached that duty.

APPEAL by plaintiff from *Preston, Judge*. Orders entered 16 April 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 27 August 1985.

Plaintiff, a minor, entered Cape Fear Valley Hospital to have her adenoids removed and drainage tubes placed in her ears to remedy a persistent ear infection. The surgery was performed by defendant Pantelakos. When plaintiff returned to her hospital room following the surgery, her mother and grandmother noticed a "greenish mark" on her right hand. They had not observed the mark prior to plaintiff's leaving for surgery. They brought the mark to the attention of defendant Pantelakos, who diagnosed it as a burn and prescribed an ointment.

Subsequently, the burn required further treatment. Plaintiff was readmitted to the hospital and skin was grafted from her thigh to the burned area. Scarring resulted.

Alleging negligence, plaintiff seeks to recover for her injury from defendant hospital system and defendant Pantelakos, the

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surgeon. From orders granting defendants' motions for summary judgment, plaintiff appeals.

Carter & Melvin, by Lester G. Carter, Jr., and Stephen R. Melvin, for plaintiff appellant.

Clark, Shaw, Clark, Lingle & Anderson, by John G. Shaw and Dougald N. Clark, Jr., for defendant appellee Cumberland County Hospital System, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, Jodee Sparkman King and William H. Moss, for defendant appellee Dr. C. G. Pantelakos.

WHICHARD, Judge.

The sole question is whether the court erred in granting defendants' motions for summary judgment. A movant is entitled to summary judgment pursuant to N.C. Gen. Stat. 1A-1, Rule 56 when the record, viewed in the light most favorable to the non-moving party, presents "'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Easter v. Hospital*, 303 N.C. 303, 305, 278 S.E. 2d 253, 255 (1981), quoting *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980); *Sharpe v. Quality Education, Inc.*, 59 N.C. App. 304, 306-07, 296 S.E. 2d 661, 662 (1982). Issues of negligence should ordinarily be resolved by a jury and are rarely appropriate for summary judgment. *Easter, supra*.

[1, 2] Plaintiff contends that the facts as set out in the depositions, answers to interrogatories, and affidavits submitted to the court are sufficient to invoke the doctrine of *res ipsa loquitur*. We agree. While ordinarily negligence must be proved and cannot be inferred from the fact of an injury, *Kekelis v. Machine Works*, 273 N.C. 439, 442, 160 S.E. 2d 320, 322 (1968), *res ipsa* applies and allows the finder of fact to draw an inference of negligence from the circumstances surrounding an injury when (1) "the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission," (2) "direct proof of the cause of [the] injury is not available," and (3) "the instrumentality involved in the accident is under the defendant's control." *Russell v. Sam Solomon Co.*, 49 N.C. App. 126, 130, 270 S.E. 2d 518, 520 (1980), *disc. rev. denied*, 301 N.C. 722, 274 S.E. 2d 231 (1981). The inference created

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by *res ipsa* will defeat a motion for summary judgment even though the defendant presents evidence tending to establish absence of negligence. *Mitchell v. Saunders*, 219 N.C. 178, 183-84, 13 S.E. 2d 242, 245-46 (1941) (pre-Rules case but *res ipsa* principles applicable). The burden of proving negligence, however, remains with the plaintiff; accordingly, the finder of fact may reject the permissible inference of negligence even though the defendant presents no evidence. *Id.*

Application of *res ipsa* in medical malpractice actions has received special attention, resulting in what our Supreme Court has characterized as a "somewhat restrictive" application of the doctrine. *Id.* at 182, 13 S.E. 2d at 244. The precautions in applying *res ipsa* to a medical malpractice action stem from an awareness that the majority of medical treatment involves inherent risks which even adherence to the appropriate standard of care cannot eliminate. *Id.* This, coupled with the scientific and technical nature of medical treatment, renders the average juror unfit to determine whether plaintiff's injury would rarely occur in the absence of negligence. *Id.* Unless the jury is able to make such a determination plaintiff clearly is not entitled to the inference of negligence *res ipsa* affords. To allow the jury to infer negligence merely from an unfavorable response to treatment would be tantamount to imposing strict liability on health care providers. *See Koury v. Folly*, 272 N.C. 366, 373, 158 S.E. 2d 548, 554 (1968). Once plaintiff's proof has addressed these concerns, however, no bar to application of *res ipsa* in medical malpractice actions exists. *Mitchell*, 219 N.C. at 182, 13 S.E. 2d at 245; *see also Parks v. Perry*, 68 N.C. App. 202, 206-07, 314 S.E. 2d 287, 289 (1984).

[3] We find plaintiff's forecast of evidence sufficient to allow reasonable jurors to find the first prong of the *res ipsa* test, *viz.*, that the injury sustained was not an inherent risk of the operation and would rarely if ever occur absent negligence. Plaintiff's failure to present a forecast of expert testimony is not fatal. "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E. 2d 616, 617 (1947). When, as here, the facts can be evaluated based on common experience and knowledge, expert testimony is not required. *See, e.g., Tice v. Hall*, 310 N.C. 589, 313 S.E. 2d 565 (1984) (expert testimony not required to

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establish defendant's breach of a standard of care when sponge is left in plaintiff's body following surgery; N.C. Gen. Stat. 90-21.12, which codifies the "same or similar community" standard of care for health care providers, does not compel otherwise); *Koury*, 272 N.C. 366, 158 S.E. 2d 548 (doctor administered drug to child in contravention to warning labels; expert testimony not required); *Gray*, 227 N.C. 463, 42 S.E. 2d 616 (doctor left child who had swallowed a dozen aspirin unattended for eleven hours; expert testimony not required); cf. *Hoover v. Hospital Inc.*, 11 N.C. App. 119, 180 S.E. 2d 479 (1971) (patient suffered nerve damage following surgery; absence of expert testimony establishing that such injury rarely occurs in absence of negligence held fatal to plaintiff's claim). While undoubtedly risks are inherent in the medical treatment plaintiff received, a jury, based on common knowledge and experience, could reasonably conclude that a burn on a portion of her body not involved in the surgery was not among those risks, and that, but for the negligence of some person(s) in control of her person and the instrumentalities used in her treatment, she would not have been injured. W. Prosser & W. Keeton, *The Law of Torts* Sec. 39 at 256 (5th ed. 1984) (a jury may properly infer medical malpractice from an injury to "an inappropriate part of [a patient's] anatomy" without the aid of expert testimony). See *West Coast Hosp. Ass'n v. Webb*, 52 So. 2d 803 (Fla. 1951); *Hand v. Park Community Hosp.*, 14 Mich. App. 371, 165 N.W. 2d 673 (1968).

While plaintiff did not forecast evidence of what caused her injuries, a probable explanation emerges from defendant Pantelakos' deposition. He testified that during surgery a hyfrecator malfunctioned and had to be replaced. The hyfrecator emits an electrical current and is used to cauterize blood vessels in the area of surgery. Defendant Pantelakos described the malfunctioning hyfrecator as "sparking and putting out a large current." He further stated that he noticed that a ground plate had not been placed under the plaintiff. When in place, a ground plate rests under the patient and a cord leads from the plate to the front of the hyfrecator unit. According to defendant Pantelakos, a ground plate could prevent some of the "sparking and gapping" characteristic of a defective hyfrecator. He also testified that although he is solely responsible for the use of the hyfrecator during surgery, it is the responsibility of operating room personnel to set up

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the ground plate. Due to the risks associated with moving an anesthetized patient, defendant Pantelakos could not use a ground plate with the second hyfrecator.

As a safety measure, defendant Pantelakos had previously initiated a policy of using ground plates in conjunction with the hyfrecators at Cape Fear Valley Hospital. It was his experience that the machines often malfunction due to improper maintenance. He also described the hyfrecators as "really cheap" and "poorly adjustable." The use of ground plates, according to defendant Pantelakos, constituted "good medical practice."

While this testimony falls short of establishing the actual causation necessary to prove negligence directly, it identifies a plausible source of plaintiff's injury. Such evidence may be considered in determining whether *res ipsa* should apply. "[*Res ipsa*] must not be supposed to require that plaintiff . . . must rely altogether upon this prima facie showing . . . of negligence, for [s]he may resort to other proof for the purpose of particularizing the negligent act and informing the jury as to the special cause of [her] injury." *Brown v. Manufacturing Co.*, 175 N.C. 201, 203, 95 S.E. 168, 169 (1918). See Byrd, *Proof of Negligence in North Carolina: Part I. Res Ipsa Loquitur*, 48 N.C. L. Rev. 452, 473 (1969-70) ("Plaintiff's evidence that tends to limit the possible causes of the accident may facilitate rather than bar the application of *res ipsa*."). See also *Boyd v. Kistler*, 270 N.C. 744, 747, 155 S.E. 2d 208, 210 (1967) (*res ipsa* held inapplicable; absence of evidence indicating "when and how the injury occurred and who caused it" noted by the court).

The second prong of the *res ipsa* test is that direct proof of the cause of injury must be unavailable to plaintiff. *Byrd v. Hospital*, 202 N.C. 337, 343-44, 162 S.E. 738, 741 (1932); *McPherson v. Hospital*, 43 N.C. App. 164, 168, 258 S.E. 2d 410, 413 (1979). Here plaintiff was anesthetized during surgery and can offer no account of her injury. Plaintiff's mother and grandmother can only attest to the fact that her hand was not burned prior to surgery and was immediately afterward. Both defendants deny knowledge regarding plaintiff's injury. This prong of the test thus is met.

[4] The third prong of the *res ipsa* test limits application of the doctrine to situations where the instrumentality causing injury is in defendant's "exclusive" control. *O'Quinn v. Southard*, 269 N.C.

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385, 391-92, 152 S.E. 2d 538, 542-43 (1967); *McPherson*, 43 N.C. App. at 168, 258 S.E. 2d at 413. Defendants argue that plaintiff's inability to identify the instrumentality with which her injury was inflicted and her inability to identify a single defendant in exclusive control thereof preclude application of the doctrine. This literal interpretation of the requirement does not accord with the purpose of the *res ipsa* doctrine or with the case law which has applied it.

Once an instrumentality causing injury has been identified, it may more readily be said that the source of a plaintiff's injury was in defendant's control. Focus is properly placed on the presence or absence of defendant's control, and such control often may be demonstrated without identifying the instrumentality involved. Thus, when it is established that defendant is in control of the circumstances leading to plaintiff's injury, plaintiff's failure to identify an instrumentality is not dispositive. See *Gray*, 227 N.C. 463, 42 S.E. 2d 616 (doctor leaves patient unattended for unreasonable period); *Parks*, 68 N.C. App. 202, 314 S.E. 2d 287 (nurse anesthetist negligently fails to monitor position of patient's arm).

Here plaintiff has identified the hyfrecator as a probable source of her injury and, as discussed above, defendant Pantelakos' testimony regarding the defective hyfrecator strengthens the inference of negligence arising from the circumstances surrounding the injury. Further, defendants were admittedly in control of plaintiff's person and of all instruments in the operating room. To require an anesthetized patient to do more than establish the defendants' control of the circumstances causally linked to the patient's injury would artificially limit a doctrine intended to apply when the particular facts surrounding an injury are not known. See *Pendergraft v. Royster*, 203 N.C. 384, 393, 166 S.E. 285, 289 (1932), quoting *Medical Jurisprudence* (Herzog) (1931), sec. 187 p. 162-63 ("[M]ere proof of a mistake or poor results does not itself prove malpractice, but where the injury is received while the patient is unconscious, [*res ipsa*] commonly is held to apply because under such circumstances the patient would not be able to testify as to what had happened, whereas the physician could."). (Emphasis supplied by our Supreme Court.)

The purpose of requiring defendant's exclusive control is to link the inference of negligence which arises from the circum-

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stances to the defendant, such that it is more probable than not that the defendant's negligence caused plaintiff's injury. Byrd, *supra*, 48 N.C. L. Rev. at 466. In keeping with its purpose, the exclusivity requirement has not been applied literally to preclude recovery in cases where exclusive control is lacking. *Res ipsa* may be applied against a defendant lacking exclusive control when plaintiff introduces evidence of his own or third parties' lack of negligence. See *Kekelis*, 273 N.C. at 444, 160 S.E. 2d at 323. In addition, *res ipsa* has been applied against multiple defendants. *Mitchell*, 219 N.C. 178, 13 S.E. 2d 242. In *Mitchell* the defendant doctors assisted each other in performing plaintiff's surgery. Plaintiff later discovered that a surgical sponge remained in her body. Finding that each physician had a duty to remove all sponges, the Court applied *res ipsa* against both defendants. 219 N.C. at 180, 13 S.E. 2d at 244.

[5] Here, as in *Mitchell*, all in control of plaintiff's person at the time of injury are defendants in plaintiff's malpractice action. While in both cases the combined negligence of the defendants may have caused plaintiff's injury, the facts here differ from those in *Mitchell* in that here it is also possible that the negligence of one defendant is the sole cause. We do not believe this distinction warrants a result different from that in *Mitchell*. The majority of other jurisdictions addressing the application of *res ipsa* to multiple defendants are in accord. See *Oldis v. La Societe Francaise De Bienfaisance Mutelle*, 130 Cal. App. 2d 461, 279 P. 2d 184 (1955); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P. 2d 687 (1944); *Frost v. Des Moines Still College of Osteopathy & Surgery*, 248 Iowa 294, 79 N.W. 2d 306 (1957); *Matlick v. Long Island Jewish Hosp.*, 25 A.D. 2d 538, 267 N.Y.S. 2d 631 (1966); *Beaudoin v. Watertown Memorial Hosp.*, 32 Wis. 2d 132, 145 N.W. 2d 166 (1966); *Shields v. King*, 40 Ohio App. 2d 77, 317 N.E. 2d 922 (1973); *Anderson v. Somberg*, 67 N.J. 291, 305, 338 A. 2d 1, 8 (1975) ("A wholly faultless plaintiff should not fail in his cause of action by reason of defendants who have it within their power to prove nonculpability but do not do so"); *Kolakowski v. Vonis*, 83 Ill. 2d 388, 415 N.E. 2d 397 (1980); *Swan v. Tygett*, 669 S.W. 2d 590 (Mo. App. 1984). Accord *Myers v. St. Paul-Mercury Indemnity Co.*, 61 So. 2d 901 (La. App. 1952) (here, however, the court held that the presumption created by the application of *res ipsa* was destroyed when defendants produced evidence which established

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that they had done everything reasonably careful practitioners, skilled in their respective professions, could have done). *But see Talbot v. Dr. W. H. Groves' Latter-Day Saints Hosp., Inc.*, 21 Utah 2d 73, 440 P. 2d 872 (1968); *Barrett v. Emanuel Hospital*, 64 Or. App. 635, 669 P. 2d 835, *disc. rev. denied*, 296 Or. 237, 675 P. 2d 491 (1983). Still other jurisdictions have reached a similar result by finding that during an operation hospital employees become the temporary servants of the surgeon, exposing the surgeon to liability for their actions based on respondeat superior. *Jensen v. Linner*, 260 Minn. 22, 108 N.W. 2d 705 (1961); *Voss v. Bridwell*, 188 Kan. 643, 364 P. 2d 955 (1961).

We find the following reasoning persuasive:

[I]t is difficult to see how the [*res ipsa*] doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character obviously the result of someone's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. . . . If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia. But . . . this juncture has not yet been reached, and . . . the doctrine of *res ipsa loquitur* is properly applicable

. . . .

Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that [plaintiff] identify any one of them as the person who did the alleged negligent act.

. . . .

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[As to identification of the instrumentality which caused the injury,] [i]t should be enough that the plaintiff can show an injury resulting from an external force applied while [s]he lay unconscious in the hospital; this is as clear a case of identification of the instrumentality as the plaintiff may ever be able to make.

. . . .

[W]here a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over [her] body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.

Ybarra, 25 Cal. 2d at 490-94, 154 P. 2d at 689-91.

Our decision does not shift the burden of proof to defendants. That burden at all times remains with the plaintiff. The finder of fact is free to reject the inferences *res ipsa* affords to plaintiff even though defendants present no evidence. At most our decision operates to impose potential liability, in a very limited fact situation, on a defendant who fails to produce evidence establishing lack of negligence. Where defendants are in a position of superior knowledge regarding what transpired and, acting in concert, were in control of the only instrumentalities which could have caused plaintiff's injury, such a reduction in plaintiff's burden of production is justified.

[6] Lastly, relying on *Parks* defendant Pantelakos argues that *res ipsa* should not apply to defeat his motion for summary judgment as he had no "duty to inspect or monitor the position of the [plaintiff's hand]. . . ." 68 N.C. App. at 208, 314 S.E. 2d at 290. He is correct to the extent he asserts that application of *res ipsa* does not operate to impose liability when the defendant does not owe plaintiff a duty of care. *Id.*; see generally Byrd, *supra*, 48 N.C. L. Rev. at 458-66. In *Parks* the plaintiff's injury resulted from a failure to monitor properly the position of plaintiff's arm during surgery. This Court held proper summary judgment in favor of an assistant surgeon who, according to all the evidence, had no duty to monitor the position of the patient's arms. 68 N.C. App. at 208, 314 S.E. 2d at 290-91. Here, however, plaintiff's in-

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jury appears to result either from defendant Pantelakos' negligent use of the hyfrecator, or from improper maintenance of the hyfrecator by defendant hospital's agents, or both. Defendant Pantelakos clearly had a duty to use reasonable care in his operation of the hyfrecator and plaintiff may rely on *res ipsa* to create a reasonable inference that he breached that duty.

We hold plaintiff's forecast of evidence sufficient to evoke the doctrine of *res ipsa loquitur*, giving rise to a permissible inference of negligence on the part of either defendant hospital system or defendant doctor or both. The court thus erred in granting defendants' motions for summary judgment. The orders are reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ERNEST RICHARD COFIELD

No. 856SC327

(Filed 19 November 1985)

1. Constitutional Law § 60; Grand Jury § 3.3— selection of grand jury foreman—racial discrimination—evidence insufficient

There was no error in a prosecution for breaking and entering and rape in the trial court's denial of defendant's motion to quash the indictment because of discrimination against blacks in the selection of grand jury foremen. Although uncontradicted testimony indicated that 61% of the county was black and that only one black person served as a grand jury foreman in eighteen years, the record did not indicate the number of persons who served as grand jury foremen during the relevant period and it was not possible to perform the necessary statistical calculations and comparisons. Moreover, even if a violation of the Fourteenth Amendment could be found, reversal was not mandated by any precedent binding on the Court of Appeals.

2. Criminal Law § 102.5— cross-examination of defendant—prosecutor's opinion of defendant's credibility—no error

There was no prejudicial error in a prosecution for breaking and entering and rape where the prosecutor cross-examined defendant in a manner which allegedly insinuated to the jury the prosecutor's opinion of defendant's credibility where the court sustained some of defendant's objections and where

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the remaining questions, assuming they were improper, did not have the degree of inflammatory impact necessary to mandate a new trial.

3. Criminal Law § 91.6— denial of continuance—non-testimonial identification tests not available—no prejudice

There was no error in the trial court's denial of a motion to continue a prosecution for breaking and entering and rape where the only ground given in support of the motion was the unavailability of certain non-testimonial identification test results, which were introduced by defendant and which showed no evidence of defendant's hair at the scene of the crime. The length of time available to study the negative test results could not conceivably prejudice defendant.

4. Criminal Law § 138— rape—aggravating factor—choking victim into unconsciousness—joinable offense—error

The trial court erred when sentencing defendant for rape by finding the non-statutory aggravating factor that defendant choked the victim until she was unconscious after committing the rape. The commission of a joinable offense may not be used as an aggravating factor. G.S. 15A-1340.1 *et seq.*

5. Criminal Law § 138— rape—aggravating factor—physical and emotional injury in excess of that normally present

Where a rape conviction was remanded for resentencing on other grounds, it was noted that physical or emotional injury in excess of that normally present in an offense may be considered as a factor in aggravation, although a certain degree of emotional injury is inherent in all rape.

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendant from *Allsbrook, Judge*. Judgments entered 4 August 1984 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 16 October 1985.

Defendant was charged in a proper bill of indictment with 1) forcible rape and 2) felonious breaking and entering of a dwelling.

At trial the State offered evidence tending to show the following: On 25 June 1984, shortly after 9:00 a.m., the victim, "Debra," answered a knock at her front door. When she answered, a man wearing a blue work uniform asked for water for his logging truck which was parked outside. Debra closed the door, retrieved jugs from her kitchen and took them to an enclosed back porch to fill them. While she filled the jugs, the man entered the enclosure and asked for more water and then for a cigarette. Debra returned from her kitchen with a package of cigarettes in her hand. The man stepped to the kitchen door and received the cigarettes. While Debra turned to close the kitchen

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door, the man grabbed her and dragged her to her bedroom and raped her. Before he fled, the man choked Debra until she lost consciousness. Debra later identified her assailant as defendant, Ernest Richard Cofield, a truck driver for a local logging company.

The jury found defendant guilty of second degree rape and felonious breaking or entering. From judgments imposing consecutive sentences of thirty years for second degree rape and three years for felonious breaking or entering, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General W. F. Briley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Louis D. Bilinois, for defendant, appellant.

HEDRICK, Chief Judge.

[1] By Assignment of Error No. 4 based upon Exception No. 5, defendant contends the trial judge erred in failing to quash defendant's indictment because discrimination against blacks in selection of grand jury foremen abridged defendant's due process and equal protection rights as guaranteed by the North Carolina and United States Constitutions.

It is well settled that purposeful discrimination against blacks in the selection of grand jury foremen is forbidden by the Fourteenth Amendment to the United States Constitution. *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed. 2d 739 (1979). The narrow question raised by defendant is whether the evidence of discrimination in the record is sufficient to require us to reverse a conviction. We think the evidence before us is insufficient.

The presumption is that public officials have performed their duties in a fair, legal and constitutional manner. *State v. Wilson*, 262 N.C. 419, 423, 137 S.E. 2d 109, 113 (1964). In order to rebut this presumption in the context of grand jury foreman selection, the defendant must give testimony covering a significant period of time showing the number of different individuals serving as grand jury foremen, the number of blacks serving as grand jury foremen, the relative size of the black population in the relevant judicial district, and a sufficiently large disparity between the

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percentage of blacks in the population and the percentage of blacks serving as grand jury foremen to demonstrate that racial factors entered into the selection process. *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed. 2d 739 (1979).

Uncontradicted testimonial evidence indicates that sixty-one percent of Northampton County is black. R. J. White testified that during the nearly eighteen years in which he has served as Northampton County Superior Court Clerk, only one black person served as grand jury foreman. The black grand jury foreman served two six-month terms starting in July of 1979. The record before us today, however, does not indicate the number of persons who have served as grand jury foremen over the relevant time period. As the United States Supreme Court has held, "[i]nasmuch as there is no evidence in the record of the number of foremen appointed, it is not possible to perform the calculations and comparisons needed to permit a court to conclude that a statistical case of discrimination has been made out and proof under the 'rule of exclusion' fails." *Id.* at 571-572, 99 S.Ct. at 3008, 61 L.Ed. 2d at 759 (1979) (citations omitted).

Even if a violation of the Fourteenth Amendment could be found in the selection of grand jury foremen, reversal of an otherwise valid conviction is not mandated by any precedent binding on this Court. In fact, the United States Supreme Court has indicated that "[s]o long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foremen will distort the overall composition of the array or otherwise taint the operation of the judicial process." *Hobby v. United States*, ---- U.S. ----, ----, 104 S.Ct. 3093, 3098, 82 L.Ed. 2d 260, 268 (1984).

[2] By Assignment of Error No. 9, based upon Exceptions Nos. 17-20, defendant contends that "[t]he trial court erred in allowing the prosecutor, over the defendant's objections, to engage in a cross-examination of the defendant which improperly insinuated to the jury the prosecutor's opinion of the defendant's credibility."

The pertinent portions of the cross examination are as follows:

Q. Mr. Cofield, I'll ask you if on June the twenty-fifth, 1984, if you didn't talk with Debora Lynn in the same con-

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vincing manner that you are sitting there testifying to the members of the jury.

MR. LIVERMON: Object.

THE COURT: Sustained.

Q. And I'll ask you if you didn't convincingly then step inside then and grab her around her arm so that she couldn't move.

MR. LIVERMON: Object, if your Honor please.

THE COURT: Overruled.

A. No, sir.

Q. And, Mr. Cofield, I'll ask you then if you didn't stand there just as you are doing right now looking at her with nothing on your face and tell her—ask her—tell her that she was going to tell her husband and her father.

MR. LIVERMON: Object, if your Honor please. And I specifically direct my objection to the point that Mr. Beard comments on the actions of the defendant, as he is seated in the witness chair.

THE COURT: Well—I'm going to overrule the objection to the last question.

A. No, sir.

Q. And I'll ask you again if you weren't just as convincing today as you were on June the twenty-fifth when you talked with her at her front door.

MR. LIVERMON: Object.

THE COURT: Sustained.

You don't have to answer that.

The transcript clearly shows that the trial court sustained defendant's objections upon which Exceptions Nos. 17 and 20 were based. The trial court's prompt action removed any possibility of reversible error in regard to these two exceptions. *State v. Brown*, 39 N.C. App. 548, 251 S.E. 2d 706, *disc. rev. denied*, 297 N.C. 302, 254 S.E. 2d 923 (1979).

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As to Exceptions Nos. 18 and 19, we note that the scope of cross examination is firmly lodged in the trial judge's discretion, and that a new trial will not be ordered unless the verdict was influenced by improper questions. Assuming without deciding that the questions at issue were improper, they did not have the degree of inflammatory impact necessary to mandate a new trial. *State v. Bailey*, 49 N.C. App. 377, 271 S.E. 2d 752 (1980), *disc. rev. denied*, 301 N.C. 723, 276 S.E. 2d 288 (1981).

[3] Defendant asserts that the trial court erroneously denied a motion to continue and thereby denied defendant any adequate opportunity to examine certain items of evidence. The only evidentiary ground given by defendant in support of his motion to continue was the unavailability of certain "non-testimonial identification test results" conducted to detect the presence of defendant's hairs at the scene of the crime. The test results uncovered no evidence of defendant's hairs and were introduced at trial by defendant, not the State. The length of time available to study these negative test results which tend to support defendant's case could not conceivably prejudice the defendant.

Whether a defendant bases his appeal upon an abuse of judicial discretion or a denial of his constitutional rights, he must show both error and prejudice stemming from the denial of his motion to continue before he is entitled to a new trial. *State v. Penley*, 6 N.C. App. 455, 170 S.E. 2d 632 (1969), *disc. rev. denied*, 276 N.C. 85 (1970). Here, neither error nor prejudice has been shown.

[4] By his final two assignments of error, defendant contends that at sentencing the trial court failed to adhere to the North Carolina Fair Sentencing Act, G.S. 15A-1340.1 *et seq.* Defendant contends that the trial court erred in finding the following non-statutory aggravating factor:

(a) That after committing the offense of second degree rape and thereafter stating to the victim that she was going to tell on him and have him hung, the defendant then choked her until she was unconscious.

The conduct described in the trial court's finding is an offense separate but joinable with the rape charge. The commission of a joinable offense may not be used as an aggravating factor

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under the Fair Sentencing Act. *State v. Puckett*, 66 N.C. App. 600, 312 S.E. 2d 207 (1984). Therefore, this case must be remanded for resentencing.

[5] Because this case must be remanded for resentencing, we need not reach defendant's contention that the trial court erroneously found as an aggravating factor that the victim continues to suffer mentally and emotionally from this incident. The law regulating this question is clear. The impact of the crime on the victim is relevant to the question of sentencing. Where the trial court properly finds physical or emotional injury in excess of that normally present in an offense, he may consider the injury as an additional factor in aggravation or as proof that the offense was especially heinous, atrocious, or cruel. *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983).

On resentencing, the trial court should also be aware that a certain degree of emotional injury is inherent in all rape and it is presumed that the Legislature was guided by this fact when it set the presumptive sentence for rape.

No error in trial, remanded for resentencing.

Judge PARKER concurs.

Judge BECTON concurs in part and dissents in part.

Judge BECTON concurring in part and dissenting in part.

I concur in the majority's resolution of all issues except the equal protection issue. Believing that defendant made out a *prima facie* case of discrimination against blacks in the selection of grand jury foremen in violation of defendant's equal protection rights as guaranteed by the North Carolina and United States Constitutions, I dissent.

Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group

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otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." . . . The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

Rose v. Mitchell, 443 U.S. 545, 555-56, 61 L.Ed. 2d 739, 749, 99 S.Ct. 2993, 3000 (1979) (citations omitted).

I

A defendant establishes a *prima facie* case that he has been denied equal protection of the law when he shows that the procedure employed in the selection of grand jury foremen is susceptible to abuse or is not racially neutral and results in substantial underrepresentation of his race or of the identifiable group to which he belongs. *Rose v. Mitchell*, 443 U.S. at 565, 61 L.Ed. 2d at 755, 99 S.Ct. at 3005; *Castaneda v. Partida*, 430 U.S. 482, 494, 51 L.Ed. 2d 498, 510, 97 S.Ct. 1272, 1280 (1977). The burden then shifts to the State to rebut the *prima facie* case.

In its brief, defendant capsulates and analyzes the uncontradicted evidence establishing a *prima facie*, and unrebutted, case of unconstitutional exclusion of blacks from the position of grand jury foremen in Northampton County thusly:

During the 18 years prior to the return of the indictment against the defendant on July 2, 1984, only one black served as grand jury foreman in Northampton County. That person served for one year—i.e., two terms. During that same period, the court was presented with the opportunity to appoint some 36 foremen. While 61% of the county's population was black, a black member of the community held the position of foreman for only 5.6% of the time.

In my view, the disparity is drastic, and the statistically significant showing establishes a presumption of underrepresentation of

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constitutional dimension. See *Castaneda; Sims v. Georgia*, 389 U.S. 404, 19 L.Ed. 2d 634, 88 S.Ct. 523 (1967). Simply put, I reject the State's assertion in its brief that the fact that a black man was appointed grand jury foreman on 1 July 1979 "totally obliterated any vestige of racial stigma which could conceivably be said to have existed prior to 1979 with respect to selection of grand jury foremen." One bee does not make honey nor does the sighting of a swallow presage spring. Aesop's Fable, "The Spendthrift and the Swallow."

II

Our justice system must provide a remedy to those whose equal protection rights have been violated. Consequently, I believe the trial court erred when it failed to quash the indictment in this case. It is not enough to assert as the majority does, ante p. 702, that "reversal of an otherwise valid conviction is not mandated by any precedent binding on this Court." After all, the precise issue raised in this appeal has not been before this Court. Moreover, quashing the indictment on the facts of this case is far less egregious than suppressing evidence or confessions unconstitutionally obtained even if the State thereby will be unable successfully to convict the defendant. Indeed, the social cost of dismissing or quashing the indictment in this case is no different than the social cost associated with the granting of a new trial for prejudicial error committed during the course of a trial.

In the context of an equal protection challenge, the United States Supreme Court indicated in *Rose v. Mitchell* that the costs attendant to retrying a defendant are "outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice." 443 U.S. at 558, 61 L.Ed. 2d at 751, 99 S.Ct. at 3001. Nothing in *Hobby v. United States*, 468 U.S. ----, 82 L.Ed. 2d 260, 104 S.Ct. 3093 (1984), which the majority cites, undermines the sound and substantial policy reasons that impelled the *Rose v. Mitchell* decision. *Hobby* was a due process (not an equal protection) case brought by a white male who challenged the selection procedure of grand jury foremen in federal court. The United States Supreme Court explained the distinction:

Rose involved a claim brought by two Negro defendants under the Equal Protection Clause. As members of the class

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allegedly excluded from service as grand jury foremen, the *Rose* defendants had suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries.

Hobby, 468 U.S. at ----, 82 L.Ed. 2d at 267, 104 S.Ct. at 3098 (citations omitted).

Finally, I fear that the practical effect of the majority's opinion will be to send the wrong signal to superior court judges who appoint grand jury foremen in the counties once every six months. The procedure employed is familiar and was accurately detailed by the Northampton County Clerk of Court who testified that "the judge usually confers with whomever he wants to. Most of the time, it's the clerk and the sheriff and whoever he calls up to the bench." I simply cannot concur in an opinion that tells superior court judges, in effect, that they can obliterate the vestige of racial discrimination by appointing blacks as grand jury foremen for one year every eighteen years in a county that is 61% black. As Justice Marshall said in his dissent in *Hobby v. United States*, our institutions of criminal justice

serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms. They reflect what we demand of ourselves as a Nation committed to fairness and equality in the enforcement of the law. That is why discrimination "is especially pernicious in the administration of justice," why its effects constitute an injury "to the law as an institution," why its presence must be eradicated root and branch by the most effective means available.

468 U.S. at ----, 82 L.Ed. 2d at 271, 104 S.Ct. 3100-01 (footnote omitted).

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IN THE MATTER OF DONNATHENE MONTGOMERY, SUSAN MAXWELL,
ANNETTE MAXWELL, AND DAVID MAXWELL, MINOR CHILDREN

No. 8511DC203

(Filed 19 November 1985)

1. Parent and Child § 1.5— termination of parental rights—motion to modify order after appeal—evidence refused—motion denied—no abuse of discretion

The trial court did not abuse its discretion in an action to terminate parental rights by refusing to hear respondents' evidence on their motion to modify the termination of their rights for changed circumstances and by denying their motion after the Supreme Court upheld the termination. G.S. 7A-289.34, which permits modification of a termination order after appellate affirmation, does not create as a matter of right another review proceeding; the trial judge in this case had been involved since 1980 and had afforded respondents full due process in connection with the original petitions; he had heard considerable evidence and had had an opportunity to observe the parties and the witnesses; his judgments terminating respondents' parental rights were affirmed by the Supreme Court; he concluded when he declined to modify those judgments that it was in the best interests of the children that a permanent plan for their placement be provided and that a continuation of hearings and appeals would adversely affect those interests; and there was no forecast of evidence or offer of proof indicating otherwise. G.S. 7A-289.22(2); G.S. 7A-289.22(3).

2. Parent and Child § 1.6— termination of parental rights—discontinuance of visitation—written psychiatric evaluation considered—no error

The trial court did not err at a hearing at which the Department of Social Services sought to terminate visitation between respondents and their children which had been allowed pending appeal of judgments terminating parental rights by admitting into evidence psychological evaluations of respondents and their minor children even though the psychologists who prepared the reports were not subject to cross-examination. A hearing upon a motion for review is in the nature of a dispositional hearing and formal rules of evidence do not apply; therefore, the trial court could properly consider the written psychological reports in determining whether the needs of the children would be best served by modification of its previous orders concerning visitation. Moreover, copies of the reports had been made available to respondents well in advance of the hearing and respondents had sufficient opportunity to secure the psychologists' voluntary presence at the hearing or to subpoena them. G.S. 7A-289.30(b), G.S. 7A-640.

3. Parent and Child § 1.6— termination of parental rights—visitation discontinued—findings supported by evidence

The trial court's findings in an order ending visitation which had been allowed during appeal of an order terminating parental rights were supported by psychological evaluation reports, stipulations, and previous orders in the case.

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4. Parent and Child § 1— termination of parental rights—discontinuance of visitation allowed pending appeal—no error

The trial court did not err by entering an order discontinuing visitation allowed pending appeal of an order terminating parental rights where the Supreme Court had affirmed the termination, the best interests of the children required that steps be taken leading to adoption, and the trial court properly concluded that visitation under such circumstances would not be in the best interests of the children. G.S. 7A-289.22(2).

APPEAL by respondents from *Greene, K. Edward, Judge*. Orders entered 19 October 1984 and 16 November 1984 in District Court, HARNETT County. Heard in the Court of Appeals 26 September 1985.

These proceedings were originally commenced when the Department of Social Services filed petitions to terminate the parental rights of respondents, Geraldine Montgomery and David Maxwell, in their four minor children. Judge Greene granted the petitions on 8 January 1982, terminating respondents' parental rights as to each child. Although the judgments were vacated on respondents' appeal to this court, the Supreme Court allowed discretionary review and subsequently reversed the decision of this court and reinstated the trial court's judgments terminating parental rights. *In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984).

Pending determination of the case in the appellate division, respondents had been granted visitation privileges with the children. On 9 July 1984, after the decision of the Supreme Court, petitioner filed a motion requesting that visitation between respondents and the children be terminated.

Respondents opposed the motion, and filed a motion under G.S. 7A-289.34 seeking modification of the original termination order due to a change in circumstances. On 19 October 1984 Judge Greene denied respondents' motion for modification. On 16 November 1984 the judge allowed petitioner's motion to discontinue visitation. Respondents appeal from both orders.

Attorney General Lacy H. Thornburg by Assistant Attorney General Steven Mansfield Shaber, amicus curiae.

Woodall & Felmet, P.A. by E. Marshall Woodall for petitioner appellee.

O. Henry Willis, Jr. for respondent appellants.

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MARTIN, Judge.

By their appeal, respondents assert that the trial court's denial of their motion to modify the original judgments, without permitting them to offer evidence in support thereof, was error. They contend also that the subsequent order terminating visitation was not supported by competent evidence. We find no error with respect to either order.

[1] In their first assignment of error respondents contend that the trial judge erred by refusing to hear evidence on their motion to modify the termination of their parental rights and by denying their motion. Respondents' motion for modification alleged, as changed circumstances, (1) that Ms. Montgomery had undergone therapy and had substantially recovered from her mental problems; and (2) that the respondents had moved to a new home. The motion was not verified nor were any affidavits submitted in support of the allegations contained therein. In response to the motion, petitioners alleged that Ms. Montgomery had not substantially recovered from her mental disorder; and that the respondents' new home was too small and not sufficiently furnished to constitute a suitable environment for the children. At the hearing on the motion on 19 October 1984 Judge Greene heard statements of counsel for respondents and petitioner, and made findings of fact and conclusions of law, *inter alia*, that G.S. 7A-289.34 does not require the court to consider modification of its original order or to hear evidence in support of a motion for modification; that G.S. 7A-289.22(2) expresses the legislative purpose of Article 24B "to recognize the necessity for any child to have a permanent plan of care at the earliest possible age"; that the children have been continuously in a foster home for four years; and that it is in the best interest of the children that the original termination order not be modified. The court denied the motion.

There is a fundamental constitutionally protected liberty interest of natural parents in the care, custody and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982). Before parental rights can be permanently terminated, due process requires that the State support its allegations at least by clear and convincing evidence. *Id.* North Carolina requires the equivalent standard of "clear, cogent, and convincing evidence." G.S. 7A-289.30(e); *In re Montgomery*, 311 N.C. 101, 316

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S.E. 2d 246 (1984). However, General Statute 7A-289.33 provides that "[a]n order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent" Since respondents' parental rights were permanently terminated, *In re Montgomery, supra*, they no longer have any constitutionally protected interest in the four minor children.

The statute under which respondents brought their action for modification provides as follows:

§ 7A-289.34. Appeals; modification of order after affirmation.

Any child, parent, guardian, custodian or agency who is a party to a proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after the hearing. Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State. Upon the affirmation of the order of adjudication or disposition of the district court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of such an appeal, the district court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interest of the child to reflect any adjustment made by the child or change in circumstances during the period of time the case on appeal was pending, provided that if such modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if any there be, within 10 days thereafter, as to why said modifying order should be vacated or altered.

We do not interpret this statute as creating, as a matter of a right, another review proceeding of an order terminating parental rights. Rather, the statute allows the District Court, in its discretion, to modify the original order to reflect any change in circumstances or adjustment by the child while the case on appeal was pending. In other words, although all parental rights have been permanently terminated, the District Court, in its discretion,

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may modify or vacate the order due to changed circumstances. When a motion for modification is made, pursuant to G.S. 7A-289.34, it is likewise within the discretion of the court to hear, or to decline to hear, evidence in support of the motion. Unless the refusal to take additional evidence amounts to an abuse of discretion, the trial court's exercise of its discretion in excluding such evidence should not be disturbed on appeal.

When error is assigned to the exclusion of evidence, the record must show what the substance of the excluded evidence would have been. 1 Brandis on North Carolina Evidence § 26 (2d ed. 1982); *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). Since the record in this case is bereft of any forecast of evidence showing a material change in circumstances, and no offer of proof was made to show an appellate court what evidence respondents sought to put before the trial court in support of their motion, we cannot say that the trial judge abused his discretion in declining to hear evidence on respondents' motion for modification.

Nor do we find that the court abused its discretion by denying respondents' motion and refusing to modify its previous judgments terminating their parental rights. In controversies regarding child neglect and custody, "the best interest of the child is the polar star." *In re Montgomery, supra*, at 109, 316 S.E. 2d at 251. The legislature expressed its intent that the best interests of the child are controlling by recognizing "the necessity for any child to have a permanent plan of care at the earliest possible age," G.S. 7A-289.22(2), and by providing that "[a]ction which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict." G.S. 7A-289.22(3). Judge Greene had been involved in these proceedings since 1980 and had afforded respondents full due process in connection with the original petitions. He had heard considerable evidence and had had an opportunity to observe the parties and the witnesses. Subsequently, his judgments terminating respondents' parental rights were affirmed by our Supreme Court. In declining to modify those judgments, Judge Greene concluded that it was in the best interests of the children that a permanent plan for their placement be provided and that a continuation of hearings and appeals would adversely affect those interests. The conclusions were made in the absence of any forecast of evidence or offer of

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proof indicating otherwise. Thus, there was no reason for Judge Greene to exercise his discretion to modify the judgments terminating respondents' parental rights as there was no basis upon which to conclude that the best interests of the children would be served by doing so. This assignment of error is overruled.

[2] By their second assignment of error, respondents contend that Judge Greene erred in admitting into evidence, at the 16 November 1984 hearing on petitioner's motion for review seeking a termination of visitation, reports of psychological evaluations of respondents and the minor children. Respondents contend that the reports should not have been admitted because they are hearsay and because the psychologists who prepared the reports were not subject to cross-examination.

The psychological evaluations were conducted in consequence of a court order entered 17 August 1984 upon motion, pursuant to G.S. 7A-289.30(b), by counsel for respondents, who requested the evaluations in connection with respondents' motion to modify the judgments terminating parental rights. The order specified that the mental health center make the examinations and submit a written report to the court and to counsel. The evaluations of the children indicated unequivocally that the children preferred living with their foster mother, were well adjusted to their foster home and to their school environment, and that it was in their best interest to stay in the foster home. The evaluation of the female respondent showed that she tested in the "mildly retarded range." She "insisted repeatedly that she was pregnant and had been pregnant continuously for over two years," and "reported that she is hearing voices once or twice a day and that sometimes people whom she can't see, watch her." The evaluation concluded that Ms. Montgomery was not capable of caring for four children given her emotional and intellectual functioning level (i.e., her chronic mental illness and mental retardation).

We perceive no error in the admission of these reports at the hearing of the petitioner's motion for review of visitation. The record reflects that these children were adjudged neglected on 5 September 1980. The court entered a dispositional order granting custody to the Department of Social Services. Pursuant to G.S. 7A-664(a) and (c), the court retains jurisdiction to conduct review hearings and to modify a dispositional order at any time during

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the child's minority or until jurisdiction is terminated by court order. Where custody is removed from a parent due to an adjudication of neglect, the court is required by G.S. 7A-657 to conduct periodic review hearings and is required to consider information from "any public or private agency which will aid it in its review." While G.S. 7A-634(b) provides that at *adjudicatory* hearings upon allegations of neglect "the rules of evidence in civil cases shall apply," G.S. 7A-640 provides that a *dispositional* hearing "may be informal and the judge may consider written reports or other evidence concerning the needs of the juvenile."

We believe that the clear intent of the legislature is that a hearing upon a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing and that the formal rules of evidence do not apply. Therefore, we hold that the trial court could properly consider the written psychological reports in determining whether the needs of these children would be best served by modification of its previous orders concerning visitation. We further observe that it is apparent from the record that copies of these reports had been made available to respondents well in advance of the hearing and had respondents desired to cross-examine the psychologists, there was certainly sufficient opportunity to secure their voluntary presence at the hearing or to subpoena them. This assignment of error is overruled.

[3] In their next assignment of error respondents argue that the following findings of fact in the order terminating visitation were not supported by the evidence:

9. That it is the best interest of said children that the visitations with their parents should now be terminated for reasons as follows:

(a) That since said children were removed from the home of their parents, they have adjusted well to their foster home placement; that all of said children with exception of Annette Maxwell, expressed their desire to live with their foster parent rather than with the respondent parents; that all of said children identify the foster parent as their parent figure rather than the respondent parents.

(b) That an adoption placement for all four children in the same home is desirable; that the children are advancing in

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age; that an adoption placement must be located as soon as possible.

(c) That the question of termination of parental rights has been adjudicated; that a pre-legal adoption placement is possible at this time; such placement will, of necessity, present disruption to said children by the fact of moving said children from the home of their foster parent; that a continuation of visitation by the respondent parents with their children during a potential adoption home placement would create added disruptive consequences for the children.

(d) That in February 1983 all parties to this case agreed that the order of visitation for the respondent parents should be allowed; that at this time the petitioner and the guardian ad litem for said children express to the Court their opinion that it is not now in the best interest of said children for the respondent parents to continue their visitation with said children.

Finding 9(a) is based on the evaluation reports. Findings 9(b), 9(c) and 9(d) are based on the evaluation reports, stipulations, and previous orders in this case. The evidence that supports these findings is competent and uncontradicted.

[4] In their last assignment of error respondents argue that the trial court erred in entering the order discontinuing respondents' visitation rights. Respondents contend that there was no evidence presented that such order would be in the children's best interest. We do not agree.

We have reviewed the entire record and find that the findings of fact are supported by uncontradicted evidence. G.S. 7A-289.34 allows entry of a temporary order pending disposition of an appeal of a termination proceeding. The trial court entered the temporary order allowing respondents to visit the children pending appeal of the termination proceeding *In re Montgomery*. After our Supreme Court affirmed the termination, petitioner moved to dissolve the temporary order allowing visitation pending the appeal. Since the appeal was completed there was no reason to continue the temporary order. Respondents' parental rights were terminated and the best interests of the children required that a permanent home be found for them, G.S. 7A-289.22

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(2), *i.e.*, that steps be taken leading to their adoption. The trial court properly concluded that visitation under such circumstances would not be in the best interest of the children and dissolved the temporary order.

Respondents' obviously love their children and desire custody of them, or at least visitation rights. Termination of their parental rights did not result from wilful mistreatment of the children, but from mental and economic inability to provide even marginally adequate care for them. We find it unfortunate that the desires of the parents cannot be reconciled with the best interests of the children. In such cases, however, "it is the child's best interests which is our guiding beacon. Although courts should balance the parents' inherent right to maintain their family unit with the welfare of the minor child, it is the latter that should always prevail, if it is determined that the two interests are conflicting." *In re Montgomery*, 311 N.C. at 116, 316 S.E. 2d at 256.

The order denying the respondents' motion to modify the termination is affirmed.

The order discontinuing visitation is affirmed.

Judges ARNOLD and WELLS concur.

JOHN R. BEAMAN v. HOPE S. BEAMAN

No. 8518DC39

(Filed 19 November 1985)

1. Divorce and Alimony § 16.8— alimony—no finding of accustomed standard of living—no error

The trial court did not err in an action for divorce and alimony by failing to determine the standard of living to which the parties became accustomed during the marriage where the court's findings established that defendant wife's monthly income was inadequate to meet her reasonable needs, that her monthly income had been inadequate since at least five years before the separation, and that plaintiff's net monthly income was \$1,753 and his reasonable expenses \$1,242. G.S. 50-16.5, G.S. 50-16.1(3).

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2. Divorce and Alimony § 16.8— alimony—no finding as to value of wife's estate—no error

The trial court did not err in an action for divorce and alimony by failing to find and consider the value of defendant wife's estate where the court made a finding regarding the income defendant derived from her estate. The primary purpose for considering the parties' estates is to assist in determining earnings and earning capacities. G.S. 50-16.5.

3. Divorce and Alimony § 16.8— alimony—no finding that wife capable of earning larger income—no error

The trial court did not err in an action for divorce and alimony by failing to find that defendant wife was capable of earning a greater income than she was currently earning where the court found that for the first half of 1984 defendant earned as an artist approximately the same amount of money she earned in the first half of the year in which she earned her largest ever salary. There was no evidence presented concerning the salary her administrative skills would have permitted her to earn. G.S. 50-16.5.

4. Divorce and Alimony § 16.8— conclusion that plaintiff supporting spouse and defendant dependent spouse—no error

The trial court did not err in an action for divorce and alimony by concluding that plaintiff was a supporting spouse and defendant a dependent spouse where the court found that for the last five years of the marriage defendant earned insufficient income to meet her reasonable needs and that plaintiff's net monthly income was \$1,753 and his reasonable expenses \$1,242.

5. Divorce and Alimony § 16.8— alimony—no finding regarding financial contributions of each party

The trial court did not err in an action for divorce and alimony by not making a specific finding concerning the contributions of each party to the financial status of the marital unit where it was clear from the findings that the court considered this evidence in determining its award of alimony. G.S. 50-16.5.

6. Divorce and Alimony § 16.8— alimony—duplication of wife's personal and business expenses—no distinction in findings—error

The trial court erred in an action for divorce and alimony by failing to determine the extent to which defendant wife's business expenses duplicated her personal expenses where the court found that defendant's personal expenses included amounts for shelter, transportation, electricity, and the telephone; that the shelter expense was the total rent on her apartment, of which a portion was claimed as a business deduction for maintaining a place of business in the apartment; that defendant also took business deductions for car expenses and utilities; and it was evident from the findings of fact and conclusions of law that the court was aware of the duplication but failed to determine its extent or to consider it in determining the award of alimony. G.S. 50-16.1(1).

7. Divorce and Alimony § 27— attorney fees awarded—no error

The trial court did not err in awarding defendant wife attorney fees in an action for divorce and alimony where the uncontradicted evidence was that in

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1983 defendant's net monthly income was \$228 and for the first six months of 1984 defendant earned only \$3,490.

8. Divorce and Alimony § 27— amount of attorney fees—no error

The court's findings of fact in an action for divorce and alimony were sufficient to support the amount awarded for attorney fees.

APPEAL by the plaintiff from *Daisy, Judge*. Judgment entered 31 October 1984 in District Court, GUILFORD County. Heard in the Court of Appeals 27 August 1985.

The plaintiff seeks review of an order awarding the defendant permanent alimony and attorney's fees. The parties were married in July 1962 and separated in March 1983. On 25 May 1984 the plaintiff filed a complaint seeking absolute divorce and equitable distribution of the marital property. The defendant counterclaimed seeking alimony pendente lite, permanent alimony and attorney's fees. The parties stipulated fault, leaving for the court only the issues of dependency, and if the defendant were determined to be a dependent spouse, the amount of alimony to be awarded. The evidence before the court included affidavits and testimony of the parties and the property settlement agreement to which the parties consented but which had not been signed.

The court made the following findings of fact: the defendant possesses bachelor of arts and masters of arts degrees; between 1962 and 1978 the defendant worked full and part time at various jobs, and also spent some time as a full time student; in 1978 the defendant, with her husband's consent, resigned from gainful employment for which her largest salary was \$9,000 per year, in order to pursue full time her career as a professional painter; since the parties' separation in 1983 the defendant has looked for no employment other than her art work; the defendant has administrative skills gained through various pre-1978 employments; in 1983 the defendant had gross income of \$7,094.21, \$5,708.75 derived from her art work, \$664.07 derived from stock dividends, \$168.14 derived from interest on a checking account, and \$575.00 derived from her one-fifth share in rental property inherited from her father; after expenses incurred in connection with her art work, the defendant's net income from this source in 1983 was \$1,338.75; on her 1983 income tax return the defendant took business deductions of \$4,837.88 in connection with her art work, including \$512.67 for car expenses, \$437.96 for depreciation,

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\$1,125.70 for rent on business property, and \$156.93 for utilities; since 15 March 1983 the business property for which the deduction was taken is the apartment in which the defendant lives and does her art work; for the first six months of 1984 the defendant's gross income from her art work totalled \$3,490.00; the defendant had also sold four paintings for which she had not been paid and for which she did not know how much money she would receive; after deducting business expenses from her gross income in 1983 the defendant had net monthly income of \$228.00; the defendant has reasonable monthly personal expenses of \$772.00, including \$195.00 for shelter and \$55 for transportation; the shelter expense of \$195 is the total rent on her apartment, a portion of which she takes as a business deduction for maintaining a place of business in the apartment; the defendant does not know the value of her stock or of her rental property.

The court made further findings of fact that the plaintiff has monthly net income of \$1,753.00 derived from salary, interest, dividends, and a small business; the plaintiff has reasonable monthly expenses of \$1,242; the parties are in agreement regarding the property settlement; the defendant will receive from the plaintiff \$9,575 in cash and one-half of the net proceeds from the sale of the parties' home when the home is sold; it is estimated that the defendant will receive between \$25,000 and \$30,000 when the house is sold.

Based upon these findings of fact the court concluded that the defendant is a dependent and the plaintiff a supporting spouse, that the defendant is entitled to alimony, that the defendant's reasonable needs exceed her monthly income by over \$500 per month, that the plaintiff is able to provide alimony, and that the defendant's attorney is entitled to a partial payment of \$400 in attorney's fees. The court then granted the plaintiff absolute divorce and ordered the plaintiff to pay the defendant \$500 per month from 15 September 1984 through 15 December 1985, \$400 per month from 15 January 1986 through 15 December 1986, and \$350 per month thereafter. The court also ordered the plaintiff to make partial payment of \$400 to the defendant's attorney. The plaintiff appealed.

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Nichols, Caffrey, Hill, Evans & Murrelle, by Joseph R. Beaty, for the plaintiff appellant.

Hatfield & Hatfield, by Kathryn K. Hatfield, for the defendant appellee.

WEBB, Judge.

This appeal involves the propriety of the district court's award to the defendant of alimony and of attorney's fees. We begin by considering the award of alimony.

[1] The plaintiff argues that the district court erred in failing to determine the standard of living to which the parties became accustomed during their marriage.

In *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980), our Supreme Court stated that in determining whether one qualifies as a dependent spouse under G.S. 50-16.1(3) as well as in determining the amount of alimony to be awarded, the courts must consider the factors enumerated in G.S. 50-16.5, the section for determining the amount of alimony. These factors include "the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." However, in *Condie v. Condie*, 51 N.C. App. 522, 277 S.E. 2d 122 (1981), this Court upheld a determination that the defendant wife was a dependent spouse and an award of alimony where the lower court had failed to make specific findings of fact regarding the accustomed standard of living of the parties. In sustaining the award, this Court noted that the parties had stipulated that the defendant's monthly expenses exceeded her monthly income by \$349.07 and that the evidence showed that the defendant had no other means with which to meet those expenses. The court's finding that the plaintiff's gross monthly income was over \$2,600 supported the conclusion that the plaintiff was capable of supporting the defendant. We held that this was sufficient to support the court's order that the plaintiff pay the defendant \$250 per month in permanent alimony.

In the instant case while the court failed to make specific findings of fact regarding the parties' accustomed standard of living, the findings the court did make establish that the defendant's monthly income is inadequate to meet her reasonable needs and that this has been the case since at latest 1978, five years before

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the parties separated. The court also found that the plaintiff's monthly net income is \$1,753 and his reasonable expenses total \$1,242. This evidence clearly allows the court to determine the parties' accustomed standard of living. A specific finding of fact was not necessary. This assignment of error is overruled.

[2] Similarly, the plaintiff argues that the court erred in failing to find as a fact and to consider the value of the defendant's estate. The Court in *Williams, supra*, stated that the primary purpose in G.S. 50-16.5 for considering the parties' estates was to assist the Court in determining the parties' earnings and earning capacities. Ordinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses. *Williams, supra*. In light of the purpose for consideration of the parties' estates, the court's finding regarding the income the defendant derived from her assets was sufficient. This assignment of error is overruled.

[3] The plaintiff also argues that the court erred in failing to find as a fact that the defendant is "capable of earning far greater income than she is currently earning." Although the spouses' earning capacities is a factor for the court to consider under G.S. 50-16.5 there is no requirement that the court make a specific finding of fact where there is not sufficient evidence of the parties' earning capacities. In this case there is no evidence that the defendant has at any time earned more than \$9,000 per year. The court found that for the first half of 1984 the defendant had earned \$3,490 from sales of her paintings and had sold four other paintings for which she had not been paid and for which she did not know how much money she would receive. This evidence shows that in the first half of 1984 the defendant earned approximately the same amount of money as she earned in the first half of the year in which she earned her largest ever salary. No evidence was presented concerning what salary the defendant's administrative skills would permit her to earn. Any finding of fact that the defendant "is capable of earning far greater income than she is currently earning" would be based upon speculation. This assignment of error is overruled.

[4] The plaintiff argues that the court erred in concluding that the plaintiff is a supporting and the defendant a dependent spouse.

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"Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse. G.S. 50-16.1(3).

"Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of support or maintenance. G.S. 50-16.1(4).

Under *Condie v. Condie, supra*, to properly find a spouse dependent the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses. We have already determined that the evidence was not such as to require the court to find that the defendant was capable of earning far greater income than she currently earns. For the last five years of the parties' marriage the defendant has earned insufficient income to meet her reasonable needs. This is sufficient evidence to support the court's conclusion that the defendant is a dependent spouse. The court's findings that the plaintiff's net monthly income is \$1,753 and his reasonable expenses are \$1,242 are sufficient to support the conclusion that the plaintiff is a supporting spouse.

[5] The plaintiff contends that the court should have made a finding of fact concerning what each party had contributed to the financial status of the marital unit, as one of the "other facts of the particular case" under G.S. 50-16.5. Although the court did not make a specific finding of fact on this factor, it is clear from the findings of fact the court did make that the court considered this evidence. The court found that during the first years of the parties' marriage the plaintiff attended school full time and the defendant supported the family. Later the defendant attended school full time while the plaintiff supported her. The court also found that since 1978 the defendant has devoted her energies exclusively to her art career and has earned insufficient money in this pursuit to support herself. The court was aware of the financial contributions of the parties to the marriage and considered this in determining its award of alimony. This assignment of error is overruled.

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[6] The plaintiff also argues that the court erred in failing to determine and to consider the extent to which the defendant's business expenses duplicated her personal expenses. We believe this argument has merit.

In finding of fact No. 5 the court enumerated the defendant's personal expenses, including \$195 per month for shelter, \$55 for transportation, and \$72 for electricity and telephone. These and other enumerated expenses total \$772. The court also found that "[t]he shelter expense of \$195 is the total rent on her apartment. A portion of this amount she takes as a business deduction for maintaining a place of business in the apartment." The defendant's tax return for 1983 shows that the defendant also took business deductions of \$512.67 for car expenses and \$156.93 for utilities. In conclusion of law No. 16 the court stated that the defendant "has reasonable needs of \$772 per month which exceed her monthly income by over \$500 per month." The court then ordered the plaintiff to pay the defendant \$500 per month in alimony for the next 15 months.

It is evident from the findings of fact and conclusions that the court was aware that the defendant's business expenses duplicate her personal expenses but failed to determine the extent of the duplication or to consider it in determining its award of alimony. "'Alimony' means payment for the support and maintenance of a spouse" G.S. 50-16.1(1). It does not mean payment for the support and maintenance of a spouse's business ventures. Therefore we must agree with the plaintiff that the court improperly concluded that the defendant was entitled to the amount of alimony awarded. On remand the district court is instructed to make findings regarding the extent of this duplication of expenses and to consider it in setting its award of alimony.

[7] We next turn to the plaintiff's arguments that the court erred in awarding the defendant attorney's fees.

As a prerequisite to an award of attorney's fees the party seeking the award must be a dependent spouse, must be entitled to the relief sought, and must have insufficient means to defray the necessary expense in prosecuting her claim. *Knott v. Knott*, 52 N.C. App. 543, 279 S.E. 2d 72 (1981). We have already determined that the defendant in this case is dependent and is entitled to the relief she demands. The uncontradicted evidence shows

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that in 1983 the defendant's net monthly income was \$228. For the first six months of 1984 the defendant earned only \$3,490. This is sufficient evidence to support the court's finding that the defendant has insufficient means to sustain the financial burden of this action.

[8] Finally, the plaintiff argues that the court erred in failing to make the required findings of fact upon which a determination of the reasonableness of the fees could be based. In *Brown v. Brown*, 47 N.C. App. 323, 267 S.E. 2d 345 (1980) this Court reversed an award of attorney's fees because the lower court did not make findings of fact sufficient to permit an appellate court to determine the reasonableness of the award, such as the nature and scope of the legal services rendered and the skill and time required. In the instant case the court made the following finding of fact:

13. Defendant is an interested party, acting in good faith, who has insufficient means to sustain the entire financial burden of this litigation. Her attorney has provided good and valuable services which include preparation of answer and counterclaim, two hearings, preparation of financial affidavit, interviews with witnesses, review of private detective's report, pretrial conference with Judge and opposing counsel and numerous interviews with Defendant. Defendant's attorney is a licensed member of the North Carolina Bar since 1974, a CPA and specializes in domestic cases. Her services to Defendant have a partial value of not less than \$400.00. Said amount is in keeping with the difficulty of the case, experience of the attorney, comparable fees in the area and the result obtained.

This finding of fact is sufficient to support an award of attorney's fees of \$400. This assignment of error is overruled.

Affirmed in part, reversed and remanded in part.

Judges BECTON and MARTIN concur.

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WINFRED BREWINGTON v. GLORIA SERRATO

No. 854DC128

(Filed 19 November 1985)

1. Divorce and Alimony § 23— foreign child custody decree— jurisdiction of North Carolina court

When a prior child custody order is pending or has been entered by a court of another state, the North Carolina court may exercise jurisdiction if it determines (1) that the court of the other state no longer has jurisdiction and North Carolina has jurisdiction under one of the four alternatives listed in G.S. 50A-3, or (2) the court of the other state did not exercise jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act and North Carolina has jurisdiction pursuant to G.S. 50A-3.

2. Divorce and Alimony § 26.1— child custody—North Carolina not bound by Texas decree

North Carolina was not bound by a Texas child custody order giving the mother custody where the Texas court failed substantially to comply with the jurisdictional requirements of the Uniform Child Custody Jurisdiction Act in that the father's pleadings should have put the Texas court on notice that the child was physically present in North Carolina, but the Texas court made no findings that Texas was the home state of the child, that Texas had been the child's home state within six months before commencement of the action, or that it was in the best interest of the child for Texas to assume jurisdiction because the child had a significant connection with that state. G.S. 50A-9(a).

3. Divorce and Alimony § 23— jurisdiction to determine child custody—home state of child

The district court properly found that North Carolina is the home state of a child so that it had jurisdiction to determine custody of the child under G.S. 50A-3(a)(1) where the child had been residing with its father in this state for more than six months; all the parties had lived together in Texas for one year, then returned to North Carolina for six months whereupon defendant mother took the child to Texas under the guise of a visit, and after her failed promise to return, plaintiff brought the child back to North Carolina where they have resided since July 1983; and the minor child has resided with plaintiff father since birth except during his six month visit to Texas.

4. Divorce and Alimony § 23— jurisdiction to determine child custody—significant connection with North Carolina

The district court's findings were sufficient to establish that a child and at least one parent had a significant connection with North Carolina so as to give the court jurisdiction under G.S. 50A-3(a)(2) to determine custody of the child where it found that the child has resided with the father in North Carolina since July 1983; the mother has not contacted the child for fifteen months or sent the child birthday or Christmas presents or cards; and most of the child's care has been in North Carolina and there is substantial evidence concerning the child's care here.

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5. Divorce and Alimony § 27— interstate child custody dispute—refusal to award attorney fees and travel expenses

The trial court did not err in refusing to award defendant mother attorney fees and travel expenses in an interstate child custody dispute where the court determined that plaintiff had not violated a Texas child custody decree and that defendant was not entitled to enforcement of the Texas decree in this state.

6. Divorce and Alimony § 25.12— child visitation—limitation of location—times agreed to by parties

The trial court's finding that defendant mother had previously taken the parties' child to Texas under a false pretense and had subsequently refused to return him to North Carolina supported the court's limitation of defendant's visits with the child to plaintiff's home with others present. However, a provision permitting visitation "at such times as the parties may agree" was improper because it in effect gave plaintiff the exclusive power to deny defendant reasonable visitation with the child by withholding consent.

APPEAL by defendant from *Martin, James N., Judge*. Judgment entered 22 October 1984 in District Court, SAMPSON County. Heard in the Court of Appeals 18 September 1985.

Plaintiff commenced this action on 29 May 1984 seeking custody of his three-year-old son. Defendant, the child's mother, moved to dismiss the action on the grounds that the district court had no jurisdiction because a custody decree had been previously entered by a Texas court. She further requested that the Texas decree be given full faith and credit and that physical custody of the child be delivered to her.

The evidence before the District Court disclosed that plaintiff and defendant met and began living together in North Carolina in July 1980, and defendant thereafter became pregnant. In March 1981 defendant went to Texas due to her grandfather's illness. The minor child was born in Texas 14 July 1981. In August 1981 plaintiff joined defendant and their new born son in Texas. In July 1982, plaintiff obtained a better job in North Carolina, and the parties returned to this State with the child and continued to live together until January 1983.

In January 1983 defendant returned to Texas, taking the minor child with her. She told plaintiff that the trip was to be a temporary visit, again due to the illness of a relative. A month or two later, defendant informed plaintiff that she did not wish to return to North Carolina. In early July 1983, plaintiff went to

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Texas and was informed again by defendant that she did not intend to return with him. Over her protests, plaintiff brought their son back to North Carolina. At that time, no custody proceeding had been initiated in either Texas or North Carolina.

On 21 July 1983, defendant commenced an action in the Texas court seeking a dissolution of her common law marriage to plaintiff and requesting that she be named managing conservator of the minor child. Under Texas law "a parent appointed managing conservator of the child retains all the rights, privileges, duties and powers of a parent to the exclusion of the other parent . . .", subject to rights of visitation. Tex. Fam. Code Ann. § 14.02(a) (Vernon Supp. 1982-83). Plaintiff was served in North Carolina and filed an answer and counterclaim in the Texas action, although he did not personally appear.

On 23 January 1984, a judgment was entered in the Texas court granting defendant a divorce and appointing her managing conservator of the minor child. Plaintiff was appointed possessory conservator, entitling him to visitation under Texas law, and was required to pay defendant \$25.00 per week for child support. No appeal was taken from that judgment.

Thereafter, defendant took no steps to gain physical custody of the minor child or to enforce the Texas decree, until 17 October 1984 when she filed her response in the case *sub judice*. The minor child has resided in North Carolina with plaintiff at all times since early July 1983.

The trial court found that North Carolina had the right to exercise jurisdiction pursuant to the provisions of Chapter 50A of the North Carolina General Statutes and denied defendant's motions to dismiss. The trial court proceeded to award custody of the minor child to plaintiff. Defendant appeals.

Warrick, Johnson & Parsons, P.A., by Benjamin R. Warrick for plaintiff appellee.

William M. Bacon, III for defendant appellant.

MARTIN, Judge.

The dispositive issue on this appeal is whether the North Carolina court properly exercised jurisdiction in this interstate

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child custody dispute in view of the prior Texas order awarding custody. We hold that because Texas failed to substantially comply with the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), North Carolina was not bound by the Texas order. We affirm the judgment of the District Court.

The first question for our determination is whether Texas exercised jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act. *Jerson v. Jerson*, 68 N.C. App. 738, 315 S.E. 2d 522 (1984). North Carolina and Texas have both adopted substantially similar versions of the UCCJA. See G.S. 50A-1 to -25; Tex. Fam. Code Ann. §§ 11.51-11.73 (Vernon Supp. 1982-83).

[1] When a North Carolina court is considering jurisdiction in a custody proceeding and a prior order is pending or has been entered by a court of another state, the North Carolina court may exercise jurisdiction if it determines (1) that the court of the other state no longer has jurisdiction and North Carolina has jurisdiction under one of the four alternatives listed in G.S. 50A-3, or (2) the court of the other state did not exercise jurisdiction in substantial conformity with the UCCJA and North Carolina has jurisdiction pursuant to G.S. 50A-3. See *Hart v. Hart*, 74 N.C. App. 1, 327 S.E. 2d 631 (1985); *Davis v. Davis*, 53 N.C. App. 531, 281 S.E. 2d 411 (1981). "Under the UCCJA, a court may properly enforce a child custody order *only if* the jurisdictional requirements of G.S. 50A-3 . . . are met." *Copeland v. Copeland*, 68 N.C. App. 276, 278, 314 S.E. 2d 297, 299 (1984) (emphasis added) (out-of-state court failed to comply with notice requirement of G.S. 50A-4, -5). This Court has stated that where an action is "pending in another state, the trial court must answer the threshold question of whether the other state" exercised jurisdiction in substantial conformity with Chapter 50A. *Davis, supra* at 539-40, 281 S.E. 2d at 416. In *Davis* the court held a California decree null and void where the record failed to show that the California court exercised jurisdiction pursuant to the standards set forth in G.S. 50A-3.

North Carolina has adhered to the view that a trial court in assuming jurisdiction of custody matters must make specific findings of fact supporting its action. See *Jerson v. Jerson, supra*. In *Jerson* we stated, "[w]e have held conclusory recitations by courts

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of other states insufficient and fairness and uniform application of the UCCJA demand the same specificity of our courts." *Id.* at 740-41, 315 S.E. 2d at 524.

[2] The minor child was not in Texas at the time defendant commenced her action there for divorce and custody. N.C.G.S. 50A-9 (a), and its Texas counterpart, Tex. Fam. Code Ann. § 11.59 (Vernon Supp. 1982-83), require that certain information be presented to the court under oath:

Every party in a custody proceeding in such party's first pleading or in an affidavit to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period.

G.S. 50A-9(a). An obvious purpose of this requirement is to enable the court to determine whether it should properly exercise jurisdiction, under the UCCJA, of a child custody dispute. The information required by the statute was not presented to the Texas court in any form. The petition filed by defendant in the Texas action alleged only that the minor child was born 14 July 1981 in Texas and that he was not under the continuing jurisdiction of any other court. The petition failed to disclose any basis for the exercise of jurisdiction by the Texas court.

Plaintiff filed a response to the Texas action, and motions for continuance. From these pleadings, it was apparent that the child was physically located in North Carolina with plaintiff. These pleadings should have placed the Texas court on notice that a jurisdictional question existed; however, the Texas decree made no findings of fact to support its exercise of jurisdiction in determining the custody of the child. The "Decree for Divorce" simply identified the child by name, sex, birthplace and birthdate, and appointed defendant as managing conservator and plaintiff as possessory conservator. There were no findings that Texas was the home state of the minor child, or had been the child's home state within six months before the commencement of the action, or that it was in the best interests of the child for Texas to assume jurisdiction because the child had a significant connection with that state. Therefore, we hold that the North Carolina trial court correctly found and concluded that the Texas court had not

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assumed jurisdiction over the custody determination in substantial conformity with the UCCJA, or upon a finding of factual circumstances meeting the jurisdictional requirements of Chapter 50A. Since the Texas court had not properly assumed jurisdiction, our courts are not bound to recognize and enforce the Texas judgment. G.S. 50A-13.

We turn, then to the second question, i.e., whether the district court in this state properly exercised jurisdiction to determine custody of the child. G.S. 50A-3 provides that a court of this state has jurisdiction to make a child custody determination if:

(1) This (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships

See also Hart v. Hart, 74 N.C. App. 1, 327 S.E. 2d 631 (1985). First, we consider whether North Carolina was the home state of the child. "'Home state' means the state in which the child immediately preceding the time involved lived with the child's parents, a parent, . . . for at least six consecutive months" G.S. 50A-2(5).

[3] The trial court found that North Carolina was the home state of the minor child, Buddy Brewington, in that he had been residing within the State for more than six months. The court then proceeded in its findings to enumerate the places where the parties had lived and the duration; all parties lived together in Texas for one year then returned to North Carolina for six months, whereupon defendant took the child to Texas under the guise of a visit and after her failed promise to return, plaintiff brought his

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son back to North Carolina where they have resided since July 1983. The court's finding number 10 specifically pointed out that the minor child had resided with the plaintiff since birth except during his six month visit to Texas.

[4] We find that these facts sufficiently established that North Carolina was the home state of the child. Additionally, the court went on to consider the significant connection test. The court found that the defendant had not contacted the child for fifteen months, or sent him birthday or Christmas presents or cards. A strong bond was found to exist between the plaintiff and his son, they went fishing, plaintiff and the child resided with the plaintiff's parents, while the plaintiff was at work the child had proper adult supervision, most of the child's care has been in North Carolina and that there is substantial evidence concerning the child's care here. The court noted that the mother was on welfare and that the plaintiff had a steady job. The court found that both parties were fit and proper parents but determined that the child's best interests dictate that custody be awarded to the father. These findings were sufficient to establish that the child and at least one parent had a significant connection with North Carolina. *Hart v. Hart, supra* (significant connection found to exist where parties and their minor children had lived in North Carolina approximately 1½ years before the wife took the children to Florida, and North Carolina had been last state where parties had lived together as a family).

We find that the district court's exercise of jurisdiction over the matter, pursuant to G.S. 50A-3(a)(1) & (2) was supported by proper findings of fact and conclusions of law and was appropriate. Defendant's motion to dismiss was properly denied.

[5] Defendant also assigns error to the court's refusal to award her attorneys' fees and travel expenses pursuant to G.S. 50A-15. Since the court determined that plaintiff had not violated the Texas decree and defendant was not entitled to its enforcement in North Carolina, we perceive no abuse of discretion in the failure of the trial court to award these expenses.

[6] Defendant also contends that the trial court erred in failing to award fixed visitation to her. The court granted defendant visitation privileges in North Carolina at the plaintiff's home with others present "at such times as the parties may agree." Defend-

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ant asserts, without citing authority, that the court abused its discretion because the effect of its order was to deny her any visitation.

In order to justify severe restrictions on visitation such as those granted by the court in this case, specific findings of fact must be made. *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E. 2d 921 (1984). The trial court found that defendant had previously taken the minor child to Texas under a false pretense and had subsequently refused to return him to North Carolina. We believe this to be a sufficient and appropriate factual finding to support the court's limitation as to the location of visitation. See *Johnson v. Johnson*, 45 N.C. App. 644, 263 S.E. 2d 822 (1980).

However, we cannot approve the provision permitting visitation "at such times as the parties may agree." As a practical matter, this provision effectively gives plaintiff the exclusive power to deny defendant reasonable visitation with the child by withholding his consent. An order giving the custodial parent exclusive control over visitation will not be sustained. *In re Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971). This Court in *Stancil* explained that the award of visitation rights is a judicial function which may not be delegated to the custodial parent; "Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation." *Id.* at 552, 179 S.E. 2d at 849.

The trial judge stated that, considering the distance and expense involved in defendant's visitation, he felt that counsel could formulate a more satisfactory plan for visitation than could the court. He indicated that he would approve any reasonable visitation upon which the parties could agree. It is apparent from the order, however, that no satisfactory arrangement was agreed upon. Once the parties failed to agree, it was the duty of the trial judge to safeguard defendant's right to visitation by including a provision in the order specifying visitation periods. Because the judge failed to do so, we must remand this case to the District Court of Sampson County with instructions that the court, upon notice to both parties, conduct a hearing and enter an order specifying the times when defendant may visit with the child in plaintiff's home.

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Affirmed in part.

Remanded with instructions.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. HOWARD BEAVER

No. 8530SC265

(Filed 19 November 1985)

Narcotics § 4.4— manufacturing marijuana—constructive possession—evidence insufficient

A charge of manufacturing marijuana should have been dismissed for insufficient evidence that defendant had constructive possession of marijuana drying in a barn and growing in patches where the distance from the barn and marijuana patches to the house ranged from seventy-five to three hundred yards; there was no evidence that defendant owned the land upon which the barn or the patches were located; evidence was introduced that someone other than defendant or his mother owned the land; there was no evidence of defendant's ownership or constructive possession of the barn and marijuana fields; no evidence placed defendant in the barn, the marijuana patches or their environs at any time near his arrest; the paths leading from the house to the barn and patches were not the exclusive means by which those places could be reached; and statements by defendant and his mother immediately after his arrest, assuming admissibility, were too general and too ambiguous to constitute any evidence of defendant's guilt. G.S. 90-95(a)(1) (Supp. 1983).

Chief Judge HEDRICK dissenting.

APPEAL by defendant from *Downs, Judge*. Judgment entered 20 July 1984 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 14 October 1985.

Attorney General Thornburg, by Assistant Attorney General Lucien Capone, III, for the State.

Jones, Key, Melvin & Patton, P.A., by R. S. Jones, Jr., and Chester Marvin Jones for defendant appellant.

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BECTON, Judge.

I

Defendant was convicted by a jury of manufacturing a controlled substance under N.C. Gen. Stat. Sec. 90-95(a)(1) (Supp. 1983). (Three related charges were dismissed at the close of the State's evidence.) A subsequent motion for appropriate relief was denied. Defendant appeals the judgment entered on the verdict, contending that it was error to deny his motion to dismiss the manufacturing charge made at the close of all the evidence; that the trial court erroneously admitted statements of defendant's mother made contemporaneously with his arrest, and his own in-custody statements to his mother; and that it was error to deny his motion for appropriate relief. We conclude the defendant's motion to dismiss should have been granted, and we reverse. Therefore, we do not address the remaining assignments of error.

II

The State's evidence tended to show that on 28 July 1982, the North Carolina State Bureau of Investigation (S.B.I.) and the Cherokee County Sheriff's Department (Sheriff's Department) were involved in an aerial marijuana eradication program. A nine-person ground crew composed of special agents and sheriff's deputies followed the directions of a pilot, and turned off a rural unpaved road to the residence of defendant and his mother. The defendant came around from the rear of the house. He was wearing green coveralls and was sweating. A member of the ground crew informed defendant that some marijuana plants had been observed from the air in the vicinity behind the house and requested defendant's permission to cross the yard and pull them up. Defendant told them his mother would not appreciate their driving through her yard but directed them to an old logging road off the rural unpaved road by which the plants could be reached. The ground crew took the logging road and found marijuana drying in a barn located approximately seventy-five yards from the house. The crew observed a path leading from the barn to the house. The crew also discovered five "patches" of marijuana plants. One patch was located about 125 yards from the house; the other four patches were located about 300 yards from the house. A number of freshly mowed paths led from the house to the gen-

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eral direction of the patches. Also located in the vicinity were a corn patch and a vegetable garden.

While the ground crew was examining the marijuana patches, the defendant came back outside. The ground crew placed him under arrest and transported him in their truck back to the house. Defendant's mother was standing on the front porch. Two members of the ground crew walked up to the house and informed her they had just arrested her son for manufacturing marijuana. Defendant's mother began to cry, and at her request she and the two crew members walked down to the truck so that she could speak to her son. Two crew members testified that when they got to the truck defendant's mother said that she had tried for forty-five years to raise him right and that she told him if he messed with this stuff that it would get him in trouble. One crew member testified that defendant then told his mother to "hush" and not say anything to the officers. The other testified that he said, "Shut up, Mamma, shut up. They hadn't caught me in the fields. They hadn't caught me doing anything. Shut up."

Defendant put on evidence. He denied that he or his mother owned the land where the barn and the marijuana patches were located. He also testified that at that time he was not living at his mother's home, but only visited there on occasion.

III

Defendant contends that the evidence was not sufficient to support his conviction and that his motion to dismiss should have been granted.

A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intentment and every reasonable inference to be drawn therefrom. . . . Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. . . . All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. . . . If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. . . .

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State v. McKinney, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975) (citations omitted).

Defendant was convicted of manufacturing a controlled substance. It is not disputed that marijuana was in fact being manufactured. The dispositive question in this case is whether substantial evidence was adduced that defendant was the manufacturer, which question may only be answered by determining whether defendant was in actual or constructive possession of the marijuana. *See State v. Brown*, 64 N.C. App. 637, 640-41, 308 S.E. 2d 346, 348-49 (1983), *aff'd*, 310 N.C. 563, 313 S.E. 2d 585 (1984). The State does not contend that defendant had actual possession of the marijuana; rather, its argument is based upon a theory of constructive possession. "The doctrine of constructive possession applies when a person lacking actual physical possession nevertheless has the intent and capability to maintain control and dominion over a controlled substance." *State v. Baize*, 71 N.C. App. 521, 529, 323 S.E. 2d 36, 41 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E. 2d 34 (1985) (identifying factors to be considered in determining constructive possession: "No single factor controls.").

The evidence in the instant case is distinguishable from that in cases where there was a sufficient showing of constructive possession and analogous to that in cases where there was an insufficient showing. The distance from the barn and marijuana patches to the house, ranging from 75 yards (225 feet) to 300 yards (900 feet), was considerably more than the distance between defendant's residence and the location of the controlled substance in other cases. *See State v. Wiggins*, 33 N.C. App. 291, 235 S.E. 2d 265, *cert. denied*, 293 N.C. 592, 241 S.E. 2d 513 (1977) (no constructive possession of marijuana plants growing 55 feet and 145 feet from defendant's trailer); *cf. State v. Roten*, 71 N.C. App. 203, 321 S.E. 2d 557 (1984) (constructive possession of marijuana 282 feet from house where pipe connected to garden hose ran directly from house to marijuana plants). There was no evidence that defendant owned the land upon which the barn or the marijuana patches were located. In fact, positive evidence was introduced that someone other than defendant or his mother owned the subject land. *Cf. State v. Sanderson*, 60 N.C. App. 604, 300 S.E. 2d 9, *disc. rev. denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983) (undisputed that defendant owned or leased land). There was no evidence of

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defendant's ownership or constructive possession of the main building from which an inference of constructive possession of the barn and marijuana fields could be made. *Cf. State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983) (evidence that defendant's name on mailbox outside residence near outbuilding where heroin found, and that three bills addressed to defendant and bottle of pills bearing his name found therein supported his constructive possession of residence). No evidence placed defendant in the barn, the marijuana patches or their environs at any time near his arrest. *Cf. State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972) (marijuana found in shed in pigpen 25 yards from defendant's residence; court deemed it significant that defendant seen in outbuildings near home on numerous occasions); *State v. Sander-son* (evidence that defendant cultivated land).

The paths leading from the house to the barn and patches were not the exclusive means by which these places could be reached; there was undisputed evidence that the patches could also be accessed by the logging road which branched off the rural unpaved road in front of the residence. In *State v. Spencer*, *State v. Roten*, and *State v. Owen*, 51 N.C. App. 429, 276 S.E. 2d 478 (1981), *cert. denied*, 305 N.C. 154, 289 S.E. 2d 382 (1982), cases in which the Court found constructive possession, the path or paths from defendant's residence were the exclusive means by which the marijuana plants could be reached. Instead, our facts resemble those of *State v. Payne*, 73 N.C. App. 154, 325 S.E. 2d 654 (1985), where the marijuana fields were located from 250 to over 1,000 feet from the house "sometimes occupied" by defendants, and there were "several paths and roads winding through the land surrounding the fields." The *Payne* Court held that the motion to dismiss the manufacturing charge should have been granted.

The only other evidence arguably linking defendant to the marijuana were the statements made by defendant's mother immediately after his arrest and his response thereto. Assuming, *arguendo*, the admissibility of these statements, we believe that they are too general and too ambiguous to constitute any evidence—let alone substantial evidence—of defendant's guilt.

The weakness of the State's case is highlighted in the following excerpts from an exchange between the prosecutor and the

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trial judge, occurring when defendant made his motion to dismiss at the close of the State's evidence.

COURT: . . . Who owns the barn?

MR. PATTON: Well, I don't know who owns the barn.

COURT: I don't either.

MR. PATTON: I have no evidence as to who owns the barn. I have evidence this is part of the area, the paths going to and from it, Your Honor; the fact that there is no other residences there. I have no survey—

COURT: Then why isn't the mother charged?

MR. PATTON: I propose to call the statements by the mother and the response by the son.

COURT: So in other words, I'm to instruct the jury on this case that the only thing they've got to consider as far as guilt of this Defendant is credibility of the mother who is not here, no one's seen her and just to simply judge the credibility of some statements that she made in some area of the yard that day?

MR. PATTON: And his response to them.

COURT: And that's enough to go [to] this jury on on [sic] this case?

MR. PATTON: Your Honor, I submit that it is.

* * *

COURT: Where is the evidence that puts this Defendant in patch one, two, three, four, five or the barn—where's the evidence?

MR. PATTON: Your Honor, the evidence is that this defendant said that he and his mother lived there. He had been in a working position, a sweating position when they say him. There was no other farming activity apparent there; even the potato digging was two days old.

COURT: . . . The closest patch you've got is a hundred and twenty-five yards away. That's more than a football field. . . . And that's the closest patch. The other one was two hun-

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dred and fifty to three hundred yards away, by estimation of your witness.

* * *

MR. PATTON: Your Honor, the only thing that I can say is that this is a contiguous farm and the paths, the mowed paths where they lead from and where they lead to indicate a pattern of activity.

COURT: Where is there any evidence that those patches are on this woman's or this man's land?

MR. PATTON: I don't think the ownership of the land has any materiality there. I can grow marijuana on your land and that doesn't make you guilty.

COURT: That's exactly right, but they've got to find you and connect you with it.

MR. PATTON: That's exactly right and—

COURT: Where is his just position in this case?

MR. PATTON: And I say his just position as to how with the paths leading to and from that house leading to the barn and his physical condition on the day in question—

COURT: What physical condition?

MR. PATTON: That he was sweating and wearing coveralls and a headband—

COURT: That makes somebody guilty of growing marijuana?

In conclusion, we find that sufficient evidence has not been adduced to enable a jury to rule on the issue of defendant's guilt on the charge of manufacturing marijuana, and we hold that the charge should have been dismissed.

Reversed.

Chief Judge HEDRICK dissents.

Judge PARKER concurs.

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Chief Judge HEDRICK dissenting.

In my opinion, the evidence, when considered in the light most favorable to the State, is sufficient to require submission of the case to the jury as to whether the defendant was guilty of manufacturing marijuana, and to support the verdict rendered by the jury.

STATE OF NORTH CAROLINA v. WILLIE EUGENE LANE

No. 842SC1349

(Filed 19 November 1985)

1. Criminal Law § 89.3— prior consistent statements—credibility impeachment not required

It is not necessary for a witness's credibility to be impeached for prior consistent statements to be admissible in corroboration of a witness.

2. Criminal Law § 86.2— impeachment of defendant—convictions more than ten years before trial

G.S. 8C-1, Rule 609 did not require the trial court to exclude cross-examination of defendant about prior convictions that occurred more than ten years before the trial where the statute did not become effective until the week following defendant's trial.

3. Homicide § 6.1— involuntary manslaughter—lesser included offense of murder

Involuntary manslaughter is a lesser included offense of murder.

4. Homicide § 21.9— involuntary manslaughter—sufficient evidence of culpable negligence

There was sufficient evidence of culpable negligence to support defendant's conviction of involuntary manslaughter where defendant testified that he pointed a pistol toward the victim which fired when he tried to pull it back and that he fired a second shot in an effort to scare the victim away from him.

5. Criminal Law § 138— aggravating factor—prior crimes more than ten years old—property crimes and traffic offenses

The trial court did not err in relying upon convictions more than ten years old for property crimes and traffic offenses in finding as a factor in aggravation that defendant had prior convictions punishable by more than sixty days' confinement. G.S. 1340.4(a)(1)(o).

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6. Criminal Law § 138— failure to find mitigating factors—evidence not contradicted

The trial court did not err in failing to find in mitigation that defendant acted under duress, coercion, threat or compulsion which was insufficient to constitute a defense but significantly reduced his culpability, that defendant acted under strong provocation, or that defendant reasonably believed that his conduct was legal where defendant's evidence in support of these factors was contradicted by prosecution witnesses who testified that the victim carried no weapon and that defendant held the victim by the collar and fired two shots in rapid succession. G.S. 1340.4(a)(2)(b), (i) and (k).

7. Criminal Law § 138— weight of mitigating and aggravating factors—discretion of court

The trial court did not abuse its discretion in failing to find that the two factors in mitigation outweighed the one factor in aggravation and in imposing the maximum permissible sentence.

Judge WEBB concurring in the result.

APPEAL by defendant from *Phillips, Judge*. Judgment entered 29 June 1984 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 17 September 1985.

The defendant was tried for first degree murder. The evidence for the State showed that the defendant occupied a house in Washington in which he sold liquor and beer and operated a poker game. On 12 January 1984 the defendant put Troy Lee Oden out of the house for causing a disturbance. The defendant and two other persons escorted Mr. Oden into the yard where an argument ensued. A witness testified the defendant grabbed Mr. Oden by the collar. The witness testified he heard two shots in rapid succession and heard the defendant say "now lay down." The witness testified he saw a gun in the defendant's hand.

The medical examiner for Beaufort County testified that Mr. Oden suffered two gunshot wounds one of which was the cause of his death. The other wound would not have been sufficient to cause the death of Mr. Oden. He could not state which of the wounds was inflicted first. The medical examiner also testified that at the time of his death Mr. Oden had a blood alcohol content of .22%.

The defendant testified that immediately before the shooting Mr. Oden threatened "to f-k him up." He testified further that although he had a pistol he asked Mr. Oden to leave because he

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did not want any trouble. He stated the first shot was fired when he tried to pull the gun back from Mr. Oden and he did not intend to fire. He then testified he fired the second shot in an effort to scare Mr. Oden away from him. He also testified he did not intend to fire the second shot and he was not sure whether he pulled the trigger or the gun discharged when Mr. Oden twisted his arm.

Sammy Edwards testified for the defendant that Mr. Oden threatened the defendant and that after the defendant drew his gun Mr. Oden rushed toward the defendant and grabbed the gun. When the defendant pulled the gun back it fired. Mr. Edwards also testified that as Mr. Oden was rushing toward the defendant the defendant was backing up rapidly. He saw Mr. Oden grab the gun a second time and heard another shot.

The defendant was convicted of involuntary manslaughter and sentenced to ten years in prison. He appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Nonnie F. Midgette, for the State.

William B. Cherry for defendant appellant.

MARTIN, Judge.

[1] In his first assignment of error the defendant contends the Superior Court erred in allowing an officer to read to the jury statements made to him by two of the State's witnesses. He argues that the witnesses had not been impeached and the statements did not corroborate the witnesses. It is not necessary for a witness' credibility to be impeached for prior consistent statements to be admissible in corroboration of a witness. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979). The appellant does not say why the statements read by the officer did not corroborate the witnesses. We believe they do. This assignment of error is overruled.

[2] In his second assignment of error the defendant argues that the trial court erred in permitting the prosecutor to ask the defendant on cross-examination whether he had been convicted of several larceny charges more than ten years before the date of trial. He contends that because G.S. 8C-1, Rule 609 became effective the week following his trial the court should have followed

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that rule and excluded evidence of the defendant's prior convictions that occurred more than ten years before the trial.

Before G.S. 8C-1 became effective, the rule was that for purposes of impeachment the defendant could be cross-examined about prior convictions. This rule contained no time limits within which the convictions must have occurred. 1 H. Brandis, *Brandis on North Carolina Evidence* § 112 (1982). This rule remained in effect until the effective date of G.S. 8C-1, which applies to actions commenced after 1 July 1984. The court had no authority to implement a statute before its effective date. This assignment of error is overruled.

[3] In his third assignment of error the defendant contends it was error to submit to the jury a possible verdict of involuntary manslaughter as a lesser included offense of murder. This issue was addressed by our Supreme Court in *State v. Greene*, 314 N.C. 649, 336 S.E. 2d 87 (1985), and was resolved against defendant. This assignment of error is overruled.

[4] In his next assignment of error the defendant contends the court should have allowed his motion to set the verdict aside because there was not sufficient evidence to find him guilty of involuntary manslaughter. A death which is proximately caused by culpable negligence is involuntary manslaughter. *See State v. Greene, supra*. In this case the testimony of the defendant showed that he pointed a pistol toward Mr. Oden which fired when he tried to pull it back and that he fired the second shot in an effort to scare Mr. Oden away from him is evidence of culpable negligence. This evidence was sufficient to show culpable negligence on the part of defendant which proximately caused the death of Mr. Oden.

[5] In his fifth assignment of error the defendant argues that the trial court erred in sentencing the defendant for several reasons. The defendant first contends that the court improperly found as a factor in aggravation that the defendant had prior convictions punishable by more than 60 days' confinement pursuant to G.S. 1340.4(a)(1)(o), since the convictions relied upon were more than ten years old and were for property crimes and traffic offenses. G.S. 1340.4(a)(1)(o) does not include any time limit within which the convictions must have occurred nor does it make any

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distinction among crimes of violence, property crimes and traffic offenses. The court properly found this aggravating factor.

[6] The defendant also argues that the court erred in failing to find in mitigation that the defendant acted under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced his culpability, pursuant to G.S. 1340.4(a)(2)(b), that the defendant acted under strong provocation, pursuant to G.S. 1340.4(a)(2)(i), and that the defendant at the time reasonably believed that his conduct was legal, pursuant to G.S. 1340.4(a)(2)(k). The failure of the court to find a factor in mitigation urged by the defendant will not be overturned on appeal unless the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E. 2d 732 (1983). The defendant's evidence in support of these factors was contradicted by prosecution witnesses who testified that the victim carried no weapon and that the defendant held the victim by the collar and fired two shots in rapid succession. Therefore, the contended factors in mitigation were not shown by uncontradicted and manifestly credible evidence and the court's refusal to find the factors in mitigation was not an abuse of discretion.

[7] Finally, the defendant argues that the court abused its discretion in failing to find that the two factors in mitigation outweighed the one factor in aggravation and in imposing the maximum permissible sentence.

While [the trial judge] is required to justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by the evidence and in accordance with the Act, a trial judge need not justify the weight he attaches to any factor. He may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa.

State v. Ahearn, 307 N.C. 584, 596-97, 300 S.E. 2d 689, 697 (1983). This assignment of error is overruled.

No error.

Judge BECTON concurs.

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Judge WEBB concurs in the result.

Judge WEBB concurring in the result.

I concur in the result but I believe the defendant's third assignment of error deserves some discussion. I believe our Supreme Court erred in *State v. Greene*, No. 254A85, filed 5 November 1985 and the defendant may want to petition the Supreme Court to hear this case and change their opinion in *Greene*.

When *State v. Greene*, 74 N.C. App. 21, 328 S.E. 2d 1 (1985) was filed by this Court there was a dissent in which it was said that involuntary manslaughter is not a lesser included offense of the other degrees of homicide and the defendant, who was convicted of involuntary manslaughter on a murder indictment, had been convicted of a crime with which he was not charged. For that reason the dissenting judge said it was error to submit involuntary manslaughter to the jury and voted to arrest judgment. The dissenting judge said that involuntary manslaughter has as an element the commission of some unlawful or culpably negligent act which is not an element in murder. The Supreme Court rejected the reasoning of the dissent and held that involuntary manslaughter is a lesser included offense of murder. It said that neither the commission of an unlawful or culpably negligent act is an element of involuntary manslaughter and that murder contains all the elements of involuntary manslaughter.

I do not believe the reasoning of the Supreme Court can withstand a logical analysis. It defines involuntary manslaughter as "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony or not naturally dangerous to human life, or (2) a culpably negligent act or omission." It then says, "If the State proves beyond a reasonable doubt that the killing was caused either by an unlawful act not amounting to a felony or by culpably negligent conduct, it has proven that the killing was unlawful." This should be a good example of the proof of an element of a crime. An element of a crime is something that must be proved in order to convict a defendant of the crime. Nevertheless the Supreme Court says in *Greene* that neither an unlawful act not amounting to a felony nor a culpably negligent act is an element of involuntary manslaughter "but are two methods of proving the essential element that the killing was unlawful."

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I believe this reasoning by the Supreme Court is inconsistent with the theory upon which essential elements of crimes are based. If it is necessary to prove something in order to convict a person of a crime that something is an essential element of the crime. If there is not some evidence of culpable negligence or an unlawful act not amounting to a felony it is error to submit involuntary manslaughter to the jury. *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980). This makes them essential elements of involuntary manslaughter.

The Supreme Court also said, "The single essential element common to all four degrees of homicide is that there be an unlawful killing of a human being." If this is to be the law a new element has been added to homicide. A judge in this state has never been required to charge that a jury must find an unlawful killing in addition to the other elements in order to find a defendant guilty of any degree of homicide. The expression "unlawful killing" is simply a description of the homicides which are criminal and has never been considered an element of a crime.

I believe the defendant has the logic of the law on his side but we are bound by *Greene* to overrule this assignment of error.

STATE OF NORTH CAROLINA v. TIMOTHY WILLIAM BARTLETT

No. 8525SC246

(Filed 19 November 1985)

1. Receiving Stolen Goods § 5.2— stolen truck—intoxicated passenger—evidence insufficient

Defendant's motion to dismiss a charge of felonious possession of stolen property should have been granted where the State's evidence showed only that defendant was a passenger in a stolen vehicle; the driver, James Alexander, testified that he stole the vehicle while defendant was working; defendant was intoxicated during the time he rode in the truck as a passenger; Alexander picked up defendant at work, drove the truck to Alexander's home in Newton, then to Taylorsville to look for defendant's wife, then back to Newton; Alexander suggested that they go to Maryland; Alexander testified that he never told defendant the truck was stolen, but may have told defendant he should take the truck back while defendant was passed out; the Virginia Highway Patrol officer who arrested defendant testified that defendant was a passenger in the front seat of the truck and intoxicated when arrested; and defendant told the officer that the truck belonged to his boss but could not give a name. G.S. 14-71.1, G.S. 14-72.

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2. Criminal Law § 89.4—felonious possession of stolen property—prior inconsistent statements of witness—admissible for impeachment but not as substantive evidence

In the prosecution of a passenger in a stolen truck for felonious possession of stolen property, prior inconsistent statements of the driver were admissible for impeachment purposes but not as substantive evidence.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 13 September 1984 in Superior Court, CATAWBA County. Heard in the Court of Appeals 27 September 1985.

Defendant was charged in an indictment with felonious larceny and felonious possession of stolen property. He was tried before a jury and found guilty of felonious possession of stolen goods in violation of G.S. 14-71.1 and 14-72(a).

The essential facts are:

On 20 December 1983 Mr. Luther Cline, owner of Cline Machine Company, notified the sheriff's department that a 1983 "Silverado" Chevrolet pickup truck owned by the company was missing from the Company's premises. Mr. Cline never gave anyone permission to remove the truck. The truck was valued in excess of \$9300.00.

At approximately 11:00 p.m. the same day Officer William L. Jones, Jr., of the Virginia State Highway Patrol stopped a 1983 Chevrolet one-half ton pickup truck with a North Carolina license plate on Interstate Highway 81 in Harrisonburg, Virginia. James Alexander was driving the truck and the defendant was seated in the front passenger seat. The officer arrested Alexander for driving under the influence and the defendant for appearing in public in a drunken condition. The vehicle was later discovered to be a stolen vehicle and was subsequently identified by Mr. Cline to be the missing truck. The defendant was turned over to North Carolina authorities.

At trial the State's evidence consisted of the testimony of Luther Cline, Officer Jones and Alexander. The defendant presented no evidence. From a jury verdict of guilty of felonious possession of stolen property and a judgment sentencing him to a term of three years, the defendant appeals.

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Attorney General Thornburg by Assistant Attorney General Sueanna P. Peeler, for the State.

Waddell, Mullinax and Childs, by Charles W. Childs, Jr., for the defendant-appellant.

EAGLES, Judge.

[1] Defendant assigns as error the denial by the trial court of his motion to dismiss the charges against him made at the close of the State's evidence. Defendant was found not guilty of felonious larceny. Denial of the motion with respect to the charge of felonious possession of stolen property is the issue now before the court. Defendant contends that the State's evidence was insufficient to sustain his conviction and that the charge should not have been submitted to the jury. We agree.

In a motion to dismiss, the question presented is whether the evidence is sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury. The State's evidence as to each element of the offense charged must be substantial. Substantial evidence means more than a scintilla. The evidence considered in the light most favorable to the State and indulging every inference in favor of the State, must be such that a jury could reasonably find the essential elements of the offense charged beyond a reasonable doubt. *State v. Thomas*, 65 N.C. App. 539, 309 S.E. 2d 564 (1983).

The essential elements of felonious possession of stolen property are (1) possession of personal property, (2) valued at more than \$400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981). See G.S. Sections 14-71.1 and 14-72.

As to the first element, "[o]ne has possession of stolen property when one has both the power and the intent to control its disposition or use." *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E. 2d 904, 906 (1985). There may be joint possession of stolen goods by two or more persons if they are shown to have acted in concert. *State v. Eppeley*, 14 N.C. App. 314, 188 S.E. 2d 758, *rev'd on other grounds*, 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v.*

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Solomon, 24 N.C. App. 527, 211 S.E. 2d 478 (1975) ("exclusive possession [of stolen property] may be joint possession if persons are shown to have acted in concert or to have been *particeps criminis*").

Viewing the evidence in the light most favorable to the State, we find the evidence insufficient to withstand the motion to dismiss. The State's evidence showed only that the defendant was a passenger in the stolen vehicle. Alexander testified that he alone stole the truck while the defendant was working. During the time the defendant rode in the truck as a passenger he was in an intoxicated state. After picking up the defendant at work on the evening of 20 December 1983, Alexander drove the truck to his home in Newton, then to Taylorsville to look for the defendant's wife, then back to Alexander's home in Newton. Alexander suggested that they travel to Maryland as it was his desire to visit relatives there. Alexander testified that he never told the defendant that the truck was stolen. As to the defendant's knowledge concerning the stolen vehicle, the following testimony was elicited from Alexander during direct examination by the State's attorney:

Q. My question is, what did you tell your son-in-law about the truck?

A. Son-in-law?

Q. Stepson, what did you tell Mr. Barlett [sic] where you got the truck?

A. I told him I got it at Cline Shop.

Q. Did you tell him how you came to get it from there?

A. Yes, the keys were in it and I went over walking and looking and I got in it.

Q. Did you tell him that you didn't have permission from anybody to take it?

A. No.

Q. But you told him that you ought to take it back?

A. Yes.

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Q. An [sic] that was before you were stopped in Virginia?

A. Yes.

Q. What did he do when you said that?

A. He was passed out in the seat.

Q. You were talking to him while he was passed out?

A. I didn't know he was passed out. Hard to talk and look where you are going at the same time, but when I did he was passed out in the seat there.

Officer Jones of the Virginia State Highway Patrol testified that when he arrested the defendant he was a passenger in the front seat of the truck. He stated that the defendant was intoxicated. He questioned the defendant in his police vehicle concerning the ownership of the truck. The defendant told Officer Jones the truck belonged to his boss but could not give him a name.

We do not find the State's evidence sufficient to show that the defendant had control or could have exercised control over the vehicle. Further, the evidence as to defendant's knowledge that the vehicle was stolen is unclear, State's witness Alexander having testified that the defendant was passed out in the front seat when Alexander mentioned that he (Alexander) ought to take the truck back. No evidence, save for the fact that the defendant and Alexander went looking for defendant's wife in Taylorsville, suggests any dominion or control on the defendant's part. Alexander repeatedly stated on direct examination that he alone stole the truck.

We further find these facts to be distinguishable from the facts in *State v. Frazier*, 268 N.C. 249, 150 S.E. 2d 431 (1966). *Frazier* involved the prosecution of two defendants for unlawfully taking and carrying away a vehicle without the consent of the owner, with intent to deprive the owner of possession, without intent to steal. In *Frazier*, the evidence showed that an automobile was stolen by someone from a parking lot. Ten hours later officers saw one defendant driving the automobile and the other defendant riding as a passenger in the front seat. The officers drove up to question the defendants as they were stopped at a traffic light. When one officer got out of the police vehicle to talk

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to the defendants "they started pulling off" and in doing so their automobile struck the police car. Both defendants jumped from their automobile and began to run. The court in *Frazier* stated:

In our view, the unlawful and unexplained occupancy and use of Morton's Dodge by Frazier and Givens under the circumstances disclosed by the evidence, and the precipitous flight of both defendants when approached by the officers, was sufficient to permit and to support a finding by the jury that the Dodge was in the joint possession of Frazier and Givens.

Id. at 252, 150 S.E. 2d at 434.

Here we do not have the additional incriminating evidence of flight. Defendant Bartlett did not attempt to flee upon arrest and questioning. We have here only the unexplained presence in a stolen vehicle by a man as a passenger in such an intoxicated state that he earlier passed out in the vehicle. While evidence that the defendant knew the truck belonged to his boss but could not give his name raises a suspicion of the defendant's guilt, this is not enough. *State v. Ledford*, 24 N.C. App. 542, 211 S.E. 2d 532 (1975).

[2] The State questioned its witness Alexander concerning his prior inconsistent statements. While the statements were admissible for impeachment purposes, they were not substantive evidence against the defendant. Prior statements of a witness that are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). Thus, these statements could not be considered on the question of nonsuit. *State v. Brannon*, 21 N.C. App. 464, 204 S.E. 2d 895 (1974). The defendant's motion for nonsuit at the close of the State's evidence should have been granted.

Our resolution of this issue disposes of the appeal and makes it unnecessary to consider appellant's remaining assignments of error.

Reversed.

Judges WHICHARD and COZORT concur.

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FRANKLIN L. McDONALD, EMPLOYEE-PLAINTIFF v. BRUNSWICK ELECTRIC MEMBERSHIP CORPORATION, AND NEW HAMPSHIRE INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8510IC151

(Filed 19 November 1985)

Master and Servant § 69— workers' compensation—rehabilitative services—specially equipped van not included

In a workers' compensation action in which a worker who lost both legs and an arm sought reimbursement for a specially equipped van so that he could be independent and presented evidence that the van was a rehabilitative measure, the Industrial Commission erred by awarding plaintiff the cost of the van but not by awarding plaintiff the cost of the special adaptive equipment. "Other treatment or care" and "rehabilitative services" in G.S. 97-29 refer to services or treatment rather than to tangible non-medically related items such as a van.

Judge WELLS dissenting.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission filed 28 August 1984. Heard in the Court of Appeals 24 September 1985.

On 3 September 1982, plaintiff sustained an injury by accident arising out of and in the course of his employment which resulted in the amputation of both of his legs and his left arm. Defendants, plaintiff's employer and its insurance carrier, agreed the accident was compensable and entered into an agreement to pay plaintiff \$228 per week for total and permanent disability pursuant to G.S. 97-29 and G.S. 97-31(17). In addition, defendants agreed to compensate plaintiff's wife for nursing services and to pay for necessary renovations of plaintiff's house.

In March 1983, plaintiff filed a request with the Industrial Commission for a hearing on defendants' refusal to purchase a specially-equipped van for him. The evidence presented at the hearings conducted pursuant to plaintiff's request tends to show the following: Plaintiff has prostheses for those limbs which were amputated which enable him to be somewhat self-sustaining. Although plaintiff can walk short distances with his artificial limbs, he spends most of his time in a wheelchair. He has both a manual and a motorized wheelchair. In August 1983, plaintiff purchased a 1983 Ford cargo van for \$25,020.55. The base price of the

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van itself was \$11,757.63. The van was ordered with a customized interior package which cost an additional \$4,027.92 and was adapted with special equipment to fit plaintiff's needs at a cost of \$9,410.

Plaintiff also owns a 1975 Ford Granada which is adequate transportation for him, and his wife owns a smaller car. Plaintiff is able to get into and out of a car by sliding from a board attached to his wheelchair and into or out of the car but in doing so he requires assistance. Plaintiff can get into and out of the specially-equipped van, however, without any assistance and is able to drive the van himself. In addition, plaintiff can put his motorized wheelchair in the van whereas it cannot as a practical matter be put in a regular automobile. Plaintiff testified that he had enrolled at a community college near his home and that he planned to use the van to transport himself to the college. Without the van, someone else would have to transport him to the college and he would not be able to take his motorized wheelchair with him.

Plaintiff's rehabilitation nurse testified that it is important for plaintiff's rehabilitation that he learn to do things independently; that in order for him to get to school independently and function independently on the campus, he needs a van; and that therefore a specially-equipped van is necessary in order to fully rehabilitate plaintiff. Plaintiff's physician testified by deposition that teaching plaintiff to be able to get out of the house and to be independent is a part of rehabilitation and is important, and that he hopes eventually plaintiff will be able to drive his own car so that he will be more independent. He agreed that a specially-equipped van is an important, necessary and reasonable part of plaintiff's rehabilitation.

By opinion and award filed 9 November 1983, the deputy commissioner concluded that the specially-equipped van is a reasonable and necessary rehabilitative service within the meaning of G.S. 97-29 and ordered defendants to reimburse plaintiff in the amount of \$21,167.63 for the cost of the van itself and the special adaptive equipment installed in it. Defendants appealed to the Full Commission. On 28 August 1984, the Commission concluded that the deputy commissioner made the correct decision and affirmed and adopted the Opinion and Award filed 9 November 1983. Defendants appealed.

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Page and Baker, by H. Mitchell Baker, III, for plaintiff appellee.

Hedrick, Eatman, Gardner and Kincheloe, by Mel J. Garofalo and Nancy K. Stover, for defendant appellants.

ARNOLD, Judge.

Defendants argue that a new, fully-equipped van is not a reasonable and necessary treatment, care, or rehabilitative service within the meaning of G.S. 97-29 and that therefore the Commission's decision ordering them to pay for the van purchased by plaintiff must be reversed. Defendants have agreed to pay for the special adaptive equipment installed in the van and only contest that part of the Commission's ruling requiring them to bear the cost of the van itself. G.S. 97-29 provides, in pertinent part, as follows:

In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services shall be paid for by the employer during the lifetime of the injured employee.

Defendants contend that even the most liberal interpretation of the statute does not include the purchase of the van concerned herein and that to uphold the Commission's interpretation of G.S. 97-29 would "result in judicial legislation converting the [Workers' Compensation] Act beyond the legislative intent." We are inclined to agree.

In determining whether a specially-equipped van is included within the meaning of G.S. 97-29, we find the following rules of statutory construction set forth by our Supreme Court particularly instructive:

First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of "judicial legislation." Third, it is not

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reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid "ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced."

Deese v. Lawn and Tree Expert Co., 306 N.C. 275, 277, 293 S.E. 2d 140, 142-143, *reh'g denied*, 306 N.C. 753, 302 S.E. 2d 884 (citations omitted). One of the purposes of the Workers' Compensation Act is to insure a limited and determinate liability for employers; thus, courts must not legislate expanded liability under the guise of construing a statute liberally. *Rorie v. Holly Farms*, 306 N.C. 706, 295 S.E. 2d 458 (1982).

Our research discloses that our courts have only twice considered the meaning of the language "other treatment or care" or "rehabilitative services" in G.S. 97-29. In *Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E. 2d 157 (1967), the Supreme Court concluded that the provision for "other treatment or care" in G.S. 97-29 goes beyond and is in addition to the specific items and services set out in the statute and includes the services of family members in caring for a claimant. More recently, in *Derebery v. Pitt County Fire Marshall*, 76 N.C. App. 67, 332 S.E. 2d 94 (1985), this Court held that it was error for the Industrial Commission to require the employer pursuant to G.S. 97-29 and G.S. 97-25 to furnish the claimant employee with a wheelchair accessible place to live. In so holding, this Court stated that "neither the provision requiring payment for 'other treatment or care' nor the provision requiring payment for 'rehabilitative services' [in G.S. 97-29] can be reasonably interpreted to extend the employer's liability to provide a residence for an injured employee." *Id.* at ---, 332 S.E. 2d 97. This Court concluded that since our legislature has not included the provision of housing within the liability imposed upon employers pursuant to G.S. 97-29 or G.S. 97-25, the Commission had no authority to require the employer to bear that responsibility. *Id.*

Similarly, we conclude that neither the phrase "other treatment or care" nor the term "rehabilitative services" in G.S. 97-29 can reasonably be interpreted to include a specially-equipped van. This language in the statute plainly refers to services or treatment, rather than tangible, non-medically related items such as a

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van; thus, it would be contrary to the ordinary meaning of the statute to hold that it includes the van purchased by plaintiff. *Accord Low Splint Coal Co., Inc. v. Bolling*, 224 Va. 400, 297 S.E. 2d 665 (1982) (construction of wheelchair ramp, bathroom facilities, and other renovations to accommodate injured employee's wheelchair held not to be included within provisions of Workers' Compensation statute requiring employer to pay for "other necessary medical attention" and "reasonable and necessary vocational rehabilitation training services"); *Matter of Compensation of Smith*, 54 Or. App. 261, 634 P. 2d 809 (1981), *petition for review denied*, 292 Or. 334, 644 P. 2d 1127 (1981) (special chair recommended by employee's physician held not to come within the meaning of "medical service"). See also *Nallan v. Motion Picture St. Mech. U.*, L. 52, 49 A.D. 2d 365, 375 N.Y.S. 2d 164 (1975), *rev'd on other grounds*, 40 N.Y. 2d 1042, 360 N.E. 2d 353, 391 N.Y.S. 2d 853 (1976) (a specially-equipped automobile held not to be a "medical apparatus or device").

Although we have great sympathy for the plaintiff and admire his desire for independence, we are bound by the language of the statute. Accordingly, we hold the Commission erred in requiring defendants to reimburse plaintiff for the cost of the van. We therefore reverse the Commission's opinion and award to the extent it requires defendants to reimburse plaintiff for the cost of the van itself and affirm it to the extent it requires them to reimburse plaintiff for the cost of the special adaptive equipment.

Reversed in part; affirmed in part.

Judge MARTIN concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The Commission found and concluded that the purchase of the van was reasonable as a rehabilitative measure. The evidence supports this finding and conclusion. In my opinion, the van falls within the term "rehabilitative service" set out in G.S. 97-29.

I find *Derebery v. Pitt County Fire Marshall*, 76 N.C. App. 67, 332 S.E. 2d 94 (1985) to be distinguishable. There, the house

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ordered purchased by the Commission was for the plaintiff's convenience, not his rehabilitation.

For these reasons, I must respectfully dissent and vote to affirm the Commission's award.

THURMOND H. HALL, JR. v. PRESTON H. MABE, LORENE B. MABE AND
CAROLYN MABE HALL

No. 8521DC319

(Filed 19 November 1985)

1. Rules of Civil Procedure § 50.5— motion for directed verdict—statement of grounds therefor

A motion for directed verdict must state the grounds therefor; otherwise, error may not be urged on appeal. G.S. 1A-1, Rule 50.

2. Contracts § 27.1— contract implied in fact

In an action to recover for labor and materials provided by plaintiff in the construction of a house owned by defendants, his in-laws, and intended for use by his wife, the trial court properly submitted an issue as to whether plaintiff and defendants had an agreement regarding plaintiff's labor and materials where plaintiff's evidence tended to show a contract implied in fact that plaintiff would be compensated by an interest in the house.

3. Quasi Contracts and Restitution § 2.1— unjust enrichment—sufficiency of evidence

An issue of unjust enrichment was properly submitted to the jury in an action to recover for labor and materials provided by plaintiff in the construction of a house owned by defendants, his in-laws, and intended for use by his wife.

4. Quasi Contracts and Restitution § 1— presumption of gift—inapplicable for services to in-laws

There is no presumption of gift where services are rendered for one's parents-in-law rather than for a spouse.

5. Quasi Contracts and Restitution § 1.2— implied agreement—unjust enrichment—no fatal inconsistency

The jury's answer of "yes" to both agreement and unjust enrichment issues did not create a fatal inconsistency in the judgment for plaintiff since plaintiff's evidence showed an agreement implied in fact, not an express contract; an implied agreement does not bar a claim based on unjust enrichment; the jury merely answered "yes" to alternative theories of liability; and no double recovery was allowed.

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6. Quasi Contracts and Restitution § 2.2— verdict for labor and materials furnished—sufficiency of evidence

The evidence supported an award to plaintiff of \$7,400 for labor and materials provided by plaintiff in the construction of a house owned by defendants, his in-laws, and intended for use by his wife.

7. Quasi Contracts and Restitution § 1.2— labor and materials furnished for house—judgment against non-owner

A verdict of \$7,400 in favor of plaintiff against his former wife and in-laws for labor and materials provided by plaintiff in the construction of a house owned by the in-laws and intended for use by the wife was improper as to the wife since she has no legal interest in the house and has not legally benefited from plaintiff's work on the house.

8. Divorce and Alimony § 11— divorce from bed and board—insufficient evidence of indignities

Evidence that the husband told the wife that she should pay 50% of all living expenses or "get out" and that he wanted her wedding ring back was insufficient to require the trial court to submit an issue of indignities to the jury in an action for divorce from bed and board.

APPEAL by defendants from *Alexander, Judge*. Judgment entered 6 November 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 18 October 1985.

Plaintiff sued defendants, alleging breach of contract, quantum meruit, and unjust enrichment, and obtained a jury verdict in his favor against all defendants.

Plaintiff began courting defendant Carolyn Mabe Hall (Carolyn) in 1981. At about the same time, her parents, defendants Mabe (the Mabes), bought an old house. They intended the house to be a place for Carolyn. The Mabes first attempted to renovate the old house, but then decided to demolish the old house and build a new one. Construction began in early 1983, and plaintiff married Carolyn in April 1983. Plaintiff helped with the unsuccessful renovation and demolition of the old house and then with the construction of the new house. Money for the construction came from the Mabes, and from plaintiff's and Carolyn's joint account. In late 1983, before plaintiff and Carolyn moved into the new house, a dispute arose between plaintiff and the Mabes over who should be loss payees on the fire insurance policy on the house. The Mabes refused to put plaintiff's name on the policy. (Title to the house was then and remains in the Mabes.) The dispute escalated and the new marriage broke up. Plaintiff sued for

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the value of his services and contributions to the new house and obtained a verdict for \$7,400.00. Defendants appeal.

William L. Durham for plaintiff-appellee.

Cofer and Mitchell, by William L. Cofer, for defendant appellants.

EAGLES, Judge.

[1] Defendants bring forward a number of arguments, most of which are based on their motion for directed verdict. A motion for directed verdict must state the grounds therefor; otherwise, error may not be urged on appeal. G.S. 1A-1, R. Civ. P. 50; *Lee v. Keck*, 68 N.C. App. 320, 315 S.E. 2d 323, *disc. rev. denied*, 311 N.C. 401, 319 S.E. 2d 271 (1984). No grounds for the motion appear of record though it appears that the ground asserted was insufficiency of the evidence. We will consider denial of the motion on that basis. *See Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974). Because of non-compliance with our Rules, other questions relating to the form of the issues submitted and the jury instructions are not before us. App. R. 10(b)(2); *Kim v. Professional Business Brokers, Ltd.*, 74 N.C. App. 48, 328 S.E. 2d 296 (1985) (failure to object to issues before jury retires waives objection on appeal).

A motion for directed verdict by a defendant tests the legal sufficiency of the evidence to go to the jury. On a directed verdict motion, plaintiff's evidence must be taken as true and considered in the most favorable light, with every reasonable favorable inference. *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982). In "borderline" civil cases, the court should submit the case to the jury to avoid unnecessary appeals and retrials. *Cunningham v. Brown*, 62 N.C. App. 239, 302 S.E. 2d 822, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 754 (1983). A party may even allege and prove inconsistent or alternative theories without subjecting the case to directed verdict. G.S. 1A-1, R. Civ. P. 8(e)(2); *Alpar v. Weyerhaeuser Co., Inc.*, 20 N.C. App. 340, 201 S.E. 2d 503, *cert. denied*, 285 N.C. 85, 203 S.E. 2d 57 (1974).

[2] Defendants argue that since plaintiff admitted that there was no agreement to pay, the court should not have submitted the issue: "Did plaintiff and defendants have an agreement regarding

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his providing labor and materials in the construction upon defendant's [sic] property?" Plaintiff did not have to prove an express promise by defendants to pay him in cash for his services. A contract implied in fact is a genuine agreement, which, although not necessarily fully expressed in words, arises out of the conduct of the parties. *Ellis Jones, Inc. v. Western Waterproofing Co., Inc.*, 66 N.C. App. 641, 312 S.E. 2d 215 (1984) (contract implied in fact); *Humphrey v. Hill*, 55 N.C. App. 359, 285 S.E. 2d 293 (1982) (requisites of service contract). Plaintiff's evidence, if believed, showed an expectation, based on defendants' conduct, that plaintiff would be compensated, not in cash, but with an interest in the house, in exchange for his services. His admission that there was no agreement that he be "paid" must be understood in light of his expectation that he would receive an interest in the real property, and is not dispositive. We hold that this issue was properly submitted to the jury.

[3] Defendants also contend that the issue of unjust enrichment was erroneously submitted to the jury. When one's real property is improved or paid for based upon the owner's unenforceable promise to convey the land or some interest therein, unjust enrichment may arise. *Collins v. Davis*, 68 N.C. App. 588, 315 S.E. 2d 759, *aff'd*, 312 N.C. 324, 321 S.E. 2d 892 (1984) (per curiam). That clearly was the case here. *McCoy v. Peach*, 40 N.C. App. 6, 251 S.E. 2d 881 (1979), is distinguishable. There the issue of unjust enrichment was never reached, but the case was dismissed on procedural grounds. We hold that the jury was properly permitted to consider this issue as well. *Collins v. Davis*, *supra*.

[4] In their discussion of the previous questions defendants contended that plaintiff failed to overcome the presumption of gift arising out of the family relationship. See *Wright v. Wright*, 305 N.C. 345, 289 S.E. 2d 347 (1982). Defendants cite no authority, nor have we found any, that creates a presumption of gift where the services are rendered for one's parents-in-law as opposed to being rendered to a spouse (as in *Wright*). It is undisputed that title to the property has remained at all times in the Mabe family and that Carolyn has no legal interest in it. She has only an expectation of an inheritance. Accordingly, the presumption of gift argument is without merit.

[5] Defendants contend that when the jury answered "yes" to both the agreement and unjust enrichment issues, there was

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created a fatal inconsistency in the judgment. It is true that an express contract and an agreement implied in fact cannot co-exist. *John D. Latimer & Assocs. v. Housing Authority*, 59 N.C. App. 638, 297 S.E. 2d 779 (1982). As we noted above, plaintiff's evidence showed an agreement implied in fact, not an express contract, and an implied agreement does not bar a claim based on unjust enrichment. *Collins v. Davis, supra*. At worst, the jury answered yes to alternative theories of liability; either way defendants are liable. Defendants do not suggest that the jury allowed double recovery. By this assignment of error defendants have failed to show prejudice.

[6] Defendants attack the sufficiency of the evidence to support the amount of damages awarded to plaintiff. They rely on evidence regarding Carolyn's savings, contending that these monies were applied to the house and not to the newly wed couple's marital expenses. There was evidence supporting both theories, however, and the question was for the jury. We note that defendants neglected to consider here the presumption that those funds were expended as gifts to the marital economy. *Wright v. Wright, supra*. There was no evidence, other than oral assertions, that they were earmarked for the house. Defendants further attack the award on the ground that it is not supported by plaintiff's evidence as to hours worked and hourly payment. Plaintiff's evidence showed some 920 hours worked at tasks compensated in the area at rates ranging from \$4.00 per hour to \$5.00 per hour and higher (plaintiff put on evidence that his painting skill was above average) and that the work he did was generally of good quality. Evidence tending to detract from these figures and the quality of the work was for the jury to consider. Apparently the jury believed plaintiff. The total award can be simply arrived at by adding full payment for hours worked (\$3680 or more) to one-half the joint marital expenses about ($\$7,400 \times 1/2 = \$3,700$). Since it is adequately supported, the award must stand. *Standard Oil Co. v. Banks*, 183 N.C. 204, 111 S.E. 2 (1922) (jury's finding conclusive); *Willis v. Western Union Telegraph Co.*, 188 N.C. 114, 123 S.E. 307 (1924) (jury's discretion as to damages not reviewable).

[7] Defendants contend that the verdict against Carolyn Mabe Hall is erroneous, in view of the fact that she has never had title to the house. We agree. While Carolyn may share ultimately in

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the actual benefits of plaintiff's work, her parents are the only parties who have legally benefited and therefore are the only ones legally responsible. Judgment should be vacated as to Carolyn.

[8] The trial court refused to submit the issue of indignities to the jury, and defendants assign error. Apparently the evidence that they rely on is (1) that plaintiff, when the parties separated, told Carolyn that she should pay 50% of all living expenses or "get out" and (2) that he wanted her wedding ring back. While the legislature and the courts have consistently declined to attempt a specific definition of indignities, *see Barwick v. Barwick*, 228 N.C. 109, 44 S.E. 2d 597 (1947), isolated instances of misconduct such as those alleged here clearly do not constitute a sufficient pattern of conduct to justify divorce. *See Sanders v. Sanders*, 157 N.C. 229, 72 S.E. 876 (1911); 1 R. Lee, N.C. Family Law Section 82 (4th ed. 1979). The assignment is overruled.

Defendants have shown no error in the trial. The only error requiring further attention is the erroneous entry of judgment against Carolyn Mabe Hall. That portion of the judgment is vacated, leaving intact the judgment against the remaining defendants.

As to defendants Preston H. Mabe and Lorene B. Mabe, no error.

As to defendant Carolyn Mabe Hall, vacated.

Judges WHICHARD and COZORT concur.

STATE OF NORTH CAROLINA v. ROGER DALE DIXON

No. 8527SC682

(Filed 19 November 1985)

Criminal Law § 75.10— confession—waiver of rights valid

There was no error in the admission of defendant's custodial statement in a prosecution for rape where defendant had an I.Q. of 66 and a memory problem; had been in jail for 12 hours and questioned twice when he gave the statement; had been detained by the victim's son-in-law with a baseball bat; had been fully advised of his rights on two occasions; had indicated on each oc-

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casion that he understood his rights; had exercised his right to remain silent on the first occasion; and had given a statement on the second without threats, promises, coercion, badgering or preliminary questions from the police.

APPEAL by defendant from *Saunders, Chase B., Judge*. Judgment entered 24 January 1985 in Superior Court, GASTON County. Heard in the Court of Appeals 31 October 1985.

Defendant was charged in a proper bill of indictment with rape. At trial the State offered evidence that on 16 September 1984, the victim, a 69-year-old lady who used a cane or wheelchair to get around, was accosted and raped in her home by a person who she identified as the "crippled Dixon boy." She later specifically identified the defendant as the person who raped her. After the assault the victim called her daughter and son-in-law. The son-in-law discovered the defendant a couple of blocks from the victim's home and held him there with a baseball bat until the police came. The State also presented evidence from the physician who examined the victim. He testified that his findings were consistent with the victim's version of what had happened.

The defendant was arrested on 16 September 1984 and on 17 September 1984 he gave a statement. The defendant made a timely motion to suppress this statement. Following a *voir dire* hearing, the trial court made findings of fact and conclusions of law and admitted the statement into evidence. In the statement the defendant stated that he went to the victim's house to get a glass of water. Defendant stated that the victim gave him a glass of water and that she made sexual advances to him but that he did not rape nor attempt to rape her.

Defendant testified in his own defense. In his testimony he stated, consistent with the statement he had earlier given the police, that he went to the victim's home to get a glass of water and that the victim then initiated sexual contact with him. Defendant also presented evidence from members of his family that he had a good character and reputation in his community prior to the alleged incident. The family members also testified that the defendant had been involved in an automobile accident which had left him crippled and with a memory deficiency.

Defendant was convicted of second degree rape. From a judgment sentencing him to thirty-five years imprisonment, defendant appealed.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Robin E. Hudson, for defendant appellant.

ARNOLD, Judge.

The sole issue presented for review is whether the court erred in admitting the defendant's custodial statement into evidence. Defendant argues that while the procedural formalities were followed in obtaining a waiver of rights, this waiver should be held invalid because it was not knowingly, intelligently and voluntarily made. Defendant bases this contention upon the fact that he had an I.Q. of 66, and had a memory problem. That the police knew this but only took five minutes explaining the rights form. He also cites the fact that he had been in jail over 12 hours, and had been questioned twice when he gave the statement. Defendant further cites the manner in which he was detained by the victim's son-in-law.

Following a *voir dire* hearing on defendant's motion to suppress the court made the following findings of fact and conclusions of law before admitting the defendant's statement.

(1) On the 16th of September, 1984, the defendant was arrested as a suspect in a breaking and entering case. That the arrest took place in the context of allegations of a rape.

(2) That on this occasion, the 16th of September, 1984, the defendant was read his Miranda rights at 7:25 P.M. when he was brought to the police department; and he stated to the officer who gave him his rights that he didn't want to talk to him. That he was then placed in custody.

(3) The defendant on the 17th of September, 1984, conversed with Chief Sprinkles at 11:07 A.M. On this occasion, Chief Sprinkles took him from his cell to an interrogation room and at that time gave him the following rights—at the time the rights were given, no odor of alcohol was noticed about the person of the defendant. The defendant was asked questions which he responded to, and his answers were understandable. That the officer went over his rights from 11:07

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A.M. until Twelve A.M. and inquired and made the following statements to him: The officer asked whether or not—explained to him that he had the right to remain silent and asked if that right was understood, to which the defendant responded, “Yes;” and the officer asked—stated that, “Anything you say can and will be used against you in court,” and asked if that was understood; and the defendant responded, “Yes;” and the officer stated to the defendant that he had the right to talk to an attorney for advice before he asked—“We ask you any questions and to have him with you during questioning,” and he asked if he understood that; and the defendant said, “Yes.” That the defendant in open court stated that Chief Sprinkles told him that he didn’t have to say anything until he got a lawyer. That Chief Sprinkles further stated that, “If you cannot afford an attorney, one will be appointed for you before any questioning if you wish,” and asked if he understood that; and the defendant stated, “Yes.” That, “If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.” He inquired as to whether or not that was understood; and he responded, “Yes;” and the next question asked was, “Do you understand each of these rights I have just explained to you?” The answer provided was, “Yes;” and, “Having these rights in mind, are you still willing to talk with me and answer questions that I may ask you in reference to a rape case that happened on the 16th—on Sunday, the 16th, 1984, in Lowell?” and the answer to that question was, “Yes.” There is a provision on this waiver of rights form, which is incorporated by reference into the Court’s Order and identified as State’s Exhibit 1 for voir dire purposes, a language which begins with the title, “Waiver of Rights,” parens, “To be read by person being interviewed,” parens. It was determined by Chief Sprinkles that the defendant had a seventh grade education, and the defendant stated that he could read a little. That the police officer did read the following statement to the defendant: “I have read this statement of my rights, and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to

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me, and no pressure or coercion of any kind has been used against me.”

(4) The officer stated and the Court finds as a fact that that portion of the rights form was given to the defendant. The following language appears in the form, “With this paragraph in mind, are you still willing to talk with me and answer questions I might ask you knowing you have the right to have a lawyer with you?” The Court finds that the defendant understood that and answered, “Yes.” “Are you willing to talk with me without a lawyer present at this time knowing full well that you have the right to have one with you at this time?” The answer to that was, “Yes;” and this waiver of rights form was signed by the defendant and signed by Chief Sprinkles and was noted at a concluding time of 11:12 A.M. for the purpose of giving the rights.

(5) That subsequently his statement was made some forty-five minutes—that the room in which the interview took place was a room in the police department and that room had tables and chairs, and the total length of the interview was some forty-five minutes. That at the time the statement was made the defendant had been in custody for some twelve hours.

(6) Further, that the information concerning the address of the defendant was noted on the form as being 611 Greer Street, Lowell, North Carolina; date of birth: March 1, 1954.

(7) The Court in this matter ultimately finds that no promises or threats were made or pressure or coercion of any kind used against the defendant in securing a statement from him. That he did not request an attorney. That he freely, voluntarily, and understandingly waived his rights and made a statement to the police.

AND THE COURT CONCLUDES AS A MATTER OF LAW based upon the totality of the circumstances—determines:

(1) That the Court has proved—that the State has proved by the greater weight of the evidence that the statement given was freely, voluntarily, and understandingly given—not made under threat or promise or offers of award or inducements.

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(2) The defendant was in full understanding of his constitutional rights under the Miranda case and all of his other rights, and he waived each of those rights individually and made a statement to the police officers.

(3) The Court concludes as a matter of law that none of the constitutional rights, either Federal or State, of the defendant were violated by his arrest, detention, interrogation, or confession and accordingly concludes that the State is entitled to offer the statement into evidence and SO ORDERS, DENYING THE MOTION TO SUPPRESS.

The trial court's findings of fact are supported by the evidence. Facts found by the trial court are conclusive on the appellate courts when they are supported by the evidence. However, the conclusions drawn from the facts are reviewable. *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975).

In the case *sub judice* the record clearly shows that the technical procedural safeguards set forth in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), were followed. Thus, the question becomes whether looking at the totality of the circumstances the defendant knowingly, voluntarily and intelligently waived his right to remain silent. See *Fare v. Michael C.*, 442 U.S. 707, 61 L.Ed. 2d 197, 99 S.Ct. 2560, *reh. denied*, 444 U.S. 887, 62 L.Ed. 2d 121, 100 S.Ct. 168 (1979).

The defendant's limited mental ability is an important factor to be considered in determining whether the statement was voluntary. However, this factor does not render the statement inadmissible if it was voluntarily and understandably made. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213, 96 S.Ct. 3215 (1976). In the present case the defendant had been fully advised of his rights on two occasions. The defendant indicated on each occasion that he understood these rights. In fact on the first occasion defendant exercised his right to remain silent and the police honored his request. On 17 September he gave the police a statement without any threats, promises or coercion from the police. This statement was given without any badgering or preliminary question from the police. Considering all of these factors we find that the evidence showed that defendant knowingly and voluntari-

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ly waived his right to remain silent. Therefore, we find the trial court properly admitted defendant's statement.

No error.

Judges WELLS and PARKER concur.

LAURA M. TURNAGE, ADMINISTRATRIX OF THE ESTATE OF JOHN W. TURNAGE,
DECEASED v. DACOTAH COTTON MILLS AND LIBERTY MUTUAL IN-
SURANCE COMPANY

No. 8510IC188

(Filed 19 November 1985)

Master and Servant § 68— workers' compensation—disability from occupational disease—insufficient evidence

The Industrial Commission properly denied a claim for compensation for occupational obstructive pulmonary disease after claimant's retirement in 1974 where there was evidence that claimant's disability in 1981 resulted from non-occupational health problems, and claimant was unable to present credible evidence that he was disabled due to his occupational disease when he retired in 1974.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission entered 16 August 1984. Heard in the Court of Appeals 25 September 1985.

Charles R. Hassell, Jr., for plaintiff appellant.

J. Donald Cowan, Jr., and Smith, Moore, Smith, Schell & Hunter, of counsel, for defendant appellees.

BECTON, Judge.

The plaintiff, Laura M. Turnage, on behalf of the deceased employee, John W. Turnage, appeals from an adverse ruling of the Industrial Commission on Mr. Turnage's workers' compensation claim.

Mr. Turnage began working in the cotton industry in 1920 when he was fourteen years old. He had a seventh grade education. He developed breathing problems during his employment in

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the industry, and eventually he developed obstructive pulmonary disease due in part to cotton dust exposure. According to Mr. Turnage, his breathing problems began when he was 45 or 50 years old (1951 to 1956) and gradually worsened until, by age 50 or 55 (1956 to 1961), he would become short of breath just from going shopping. This did not affect his ability to work at that time, and he did not seek treatment for this problem before retiring from textile employment in 1974.

After his retirement, Mr. Turnage developed serious health problems that were not related to his employment. In 1982, his claim for workers' compensation benefits was heard by a deputy commissioner. The evidence presented to the deputy commissioner revealed that Mr. Turnage was diagnosed in 1972 as having arteriosclerotic heart disease with angina pectoris and problems with his legs. Mr. Turnage testified that he quit working in 1974 because he "got so short of breath [and] couldn't hold out for eight hours and do an honest day's work." Dr. Kunstling, who had examined Mr. Turnage in 1981 and 1982, testified that Mr. Turnage suffered from several serious medical conditions including heart disease and chronic bronchitis. He opined that even if Mr. Turnage had perfect lungs, he would be totally disabled due to his age, cardiovascular condition and other problems. Dr. Kunstling also testified that he could not conclude with any degree of medical certainty that Mr. Turnage's disablement, either in 1981 to 1982 or back in 1974, was caused by his occupational disease. He did state, however, that Mr. Turnage would be able to work under certain conditions if he had no medical problems other than his impaired lung function.

The deputy commissioner found, among other things, "Occupational dust exposure was a significant factor contributing to the development of plaintiff's [Mr. Turnage's] obstructive pulmonary disease." She also found as fact:

Plaintiff's obstructive pulmonary disease has not disabled him to perform work. Plaintiff is disabled due to his non-occupational health problems, but in the absence of these problems he could continue working in the textile industry as long as the dust levels met OSHA standards.

She then concluded as a matter of law that Mr. Turnage had an occupational disease but was not disabled as a result of this

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disease. The Industrial Commission reviewed the case and adopted and affirmed the opinion and award of the deputy commissioner. The Commission wrote:

The Full Commission has carefully considered the record in its entirety. Admittedly, plaintiff has byssinosis. He is 78 years of age. The learned physician who examined him was unable to say with any degree of medical certainty that this employee had any degree of disablement due to his occupational disease, and expressed the opinion that plaintiff would be totally disabled without regard to his occupational disease.

Commissioner Clay dissented:

In my opinion, the Hearing Officer erred in failing to adequately address and resolve the issue of whether the plaintiff also was disabled from work when his lung disease forced his retirement from the mill in 1974 because he would "give out" before he could do a day's work.

The Deputy Commissioner found that the plaintiff "is disabled due to his non-occupational health problems." These health problems did not develop, however, until several years after plaintiff's breathing problems forced his retirement from the mill.

... In [his 1982] report Dr. Kunstling stated: "His obstructive pulmonary disease has developed over many years, but I would date the onset of disability from the time he last worked."

* * *

In my opinion, the greater weight of the evidence supports a finding that the plaintiff was incapable of earning any wages as a result of his occupational disease when he left the mill in 1974.

Plaintiff presents only one issue on appeal: Whether the Commission erred as a matter of law in failing to make a finding as to Mr. Turnage's disability at his retirement in 1974.

There is no question in this case that Mr. Turnage had an occupational lung disease, and he was totally disabled in 1981 after developing non-occupational medical problems. The problem in

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this case arises because plaintiff alleges that Mr. Turnage was disabled in 1974 when he retired, and the evidence in this case relates primarily to his condition in 1981 and 1982. We agree with plaintiff that it is the date of disability upon which the employer's obligations are to be fixed. *See Smith v. American & Efird Mills*, 305 N.C. 507, 290 S.E. 2d 634 (1982); *Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980); *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). Thus, plaintiff argues, evidence of medical conditions subsequent to 1974 is irrelevant, and the Commission has failed to find whether Mr. Turnage was disabled in 1974 as a result of his occupational disease. We disagree.

At the time of the hearing, Mr. Turnage was totally disabled. Thus, the subsequent medical history of Mr. Turnage was relevant to show the cause of Mr. Turnage's disability. Dr. Kunstling testified that Mr. Turnage was totally disabled because of his non-occupational medical conditions. He also said that if Mr. Turnage did not have any medical problems other than the impaired lung function present in 1981 and 1982 he would be able to continue working in the cotton facility as long as he was monitored and his work area met applicable OSHA cotton dust standards. The deputy commissioner found as a fact that, in the absence of the non-occupational health problems, Mr. Turnage would have been able to work in the textile industry as long as OSHA dust standards were met. We believe this finding was adequately supported by the evidence. Of course, just because the evidence supports the finding that Mr. Turnage was not suffering from occupational disablement in 1981, it does not necessarily support the finding that he was not occupationally disabled in 1974. Nevertheless, it is the plaintiff's burden to prove that the occupational disease caused the disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). The absence of proof to the contrary does not entitle plaintiff to an award.

The evidence was insufficient to prove that Mr. Turnage's occupational disease did, or did not, cause his disablement in 1974. The only evidence pointing in either direction was Mr. Turnage's statement that he retired because of his shortness of breath and leg problems. The medical expert, Dr. Kunstling, specifically declined to express an opinion on this subject because of his inability to draw a conclusion to any degree of medical certainty. Part of the difficulty was the fact that Mr. Turnage suffered two

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strokes between 1974 and 1981, and this may have caused the restrictive lung impairment. The Commission's failure to make any findings specifically relating to Mr. Turnage's condition in 1974 is not fatal. It is clear from the record and from the opinion and award that the Commission did not believe Mr. Turnage had presented enough credible evidence to prove he was disabled due to his occupational disease in 1974.

Plaintiff's counsel suggests it is ironic that had Mr. Turnage not been ignorant of his right of action in 1974, he clearly would have recovered. It is true that had Mr. Turnage been cognizant of his claim in 1974, he would have been able to obtain a timely medical opinion as to his then-current disability and its causes. Nonetheless, he may have found that non-occupational factors were the true causes of his disability. Notwithstanding the inherent difficulty of proving causation several years after the fact, the legislature chose to require plaintiffs to prove occupational causation rather than simply prove the existence of an occupational disease. And although we might have weighed the evidence differently, as Commissioner Clay clearly would have done, we are not free to do so in this Court.

For the reasons set forth above, the Industrial Commission's opinion and award is

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

J. ALTON BARNES v. WILSON HARDWARE CO.

No. 857SC48

(Filed 19 November 1985)

Negligence § 47.1— fall down hardware store steps—summary judgment for defendant improper

The trial court erred in granting summary judgment for defendant in an action arising from a customer's fall down steps at a hardware store, allegedly due to defendant's negligent failure to provide a handrail, where there were genuine issues of fact as to whether defendant maintained the steps in a reasonably safe condition, and whether defendant converted a warehouse

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building behind the store to mercantile use after the adoption of a building code requiring handrails, in that the warehouse was built in 1926 and was used to store overflow merchandise, although sales personnel would show customers merchandise in the warehouse; the first floor, but not the second, was refurbished in 1964 so that customers could browse as they did in the main store; and sales people continued to show customers merchandise on the second floor, as the store owner was doing when the fall occurred. G.S. 1A-1, Rule 56.

APPEAL by plaintiff from *Llewellyn, Jr., Judge*. Judgment entered 19 November 1984 in Superior Court, WILSON County. Heard in the Court of Appeals 28 August 1985.

On 18 November 1983 plaintiff filed a complaint alleging that on 19 November 1982 he suffered personal injuries proximately caused by the negligent acts or omissions of defendant when he fell down the stairway on the premises of defendant's hardware store. Defendant filed answer on 14 December 1983, denying the material allegations contained in the complaint and asserting contributory negligence on the part of the plaintiff.

On 8 August 1984 defendant filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. From summary judgment granted in favor of defendant, plaintiff appealed.

M. Alexander Biggs by Martha Fountain Johnson for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog by Ronald C. Dilthey for defendant-appellee.

PARKER, Judge.

In his sole assignment of error on appeal, plaintiff contends that the court erred in granting defendant's motion for summary judgment. Summary judgment is a means of expediting litigation if the pleadings, depositions, interrogatories and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Summary judgment is a "drastic remedy . . . [that] must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830

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(1971). This rule "does not authorize the court to *decide* an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists." *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980) (emphasis in original). "[S]ummary judgment is rarely proper in negligence cases," *Wilson Brothers v. Mobil Oil*, 63 N.C. App. 334, 337, 305 S.E. 2d 40, 42, *disc. rev. denied*, 309 N.C. 634, 308 S.E. 2d 718 (1983), and these claims "should ordinarily be resolved by trial of the issues." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E. 2d 868, 871 (1983).

Plaintiff contends that genuine issues of material fact exist and that defendant is not entitled to judgment as a matter of law.

A claim for relief premised on negligence contains four essential elements: (i) a duty on the part of one party to conform to a certain standard of conduct, (ii) a breach of that duty, and (iii) an injury, which (iv) was proximately caused by the breach. *Jenkins v. Theatres, Inc.*, 41 N.C. App. 262, 254 S.E. 2d 776, *cert. denied*, 297 N.C. 698, 259 S.E. 2d 295 (1979).

In the instant case, the evidence presented through depositions and affidavits in support or defense of the motion for summary judgment tended to show that defendant Hardware had a warehouse across an alley behind the main hardware retail store. This warehouse was constructed in 1926. From the date of construction until 1964, the entire warehouse was used for storage of overflow merchandise, and sales personnel would take customers to the warehouse to show them merchandise. In 1964, the first floor was refurbished and glass doors put in so that customers could browse and shop in that portion of the hardware just as they did in the main store. No sales person was on duty in the warehouse display area, but a buzzer was activated when someone entered that portion of defendant's business. The glass doors leading into the first floor display area were not flush with the exterior wall of the building, but were recessed such that there was an alcove approximately 6' x 6' between the facade of the building and the double doors.

The steps, which are the subject matter of this lawsuit, were to the left, off the alcove before reaching the double glass doors. A sliding wooden door closed the alcove off during nonbusiness hours; when the hardware store was open, this sliding wooden door pushed into a slot in one wall. This door was opened in the

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morning and closed in the evening. The evidence was undisputed that the second floor of the warehouse had not been remodeled at the time of the 1964 refurbishing on the first level. According to defendant's president, sales people take people up these stairs to the second level many times a day to show them merchandise stored on the second floor. There was no sign forbidding customers unaccompanied by a sales person from going up the steps, though there was a light sensitive buzzer which would sound when anyone walked up the steps.

The stairway consists of nine wooden steps walled-in on each side. The treads are approximately ten and one-half inches with a half inch overlap or nose. From the top of the stair tread to the top of the next stair tread, the steps have a vertical rise of ten inches except for the top stair which is nine inches to the landing. The distance from the top landing to the concrete landing at the bottom is eleven feet eleven inches and the angle of descent measures forty-five degrees. The steps are forty-two inches wide.

Plaintiff testified on deposition that his foot slipped and he fell; that his foot could have caught on something, but he really did not know what caused him to slip and fall. Plaintiff also signed an affidavit in which he stated that his heel caught on the back of one of the steps and his foot slipped, that he fell forward head first, and that he grabbed for something to break the fall but the only thing he could get his hand on was the door frame at the bottom of the steps.

Plaintiff also tendered the affidavit of an expert witness in industrial design. This witness stated that he had examined the steps and expressed his findings as to light illumination at various positions on the stairway with the light being approximately five footcandles at the top of the stairs and increasing to twelve footcandles at the bottom of the stairs. Plaintiff testified in his deposition that he did not think the light had anything to do with it. He saw the steps and he did not think his foot missed a step.

The evidence is undisputed that the owner of the hardware store had taken plaintiff up these stairs to the second level for the purpose of showing him wheelbarrows and that at the time of the accident, the two of them were descending the stairs after looking at the wheelbarrows. Plaintiff was, therefore, unques-

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tionably an invitee on defendant's premises. A customer who enters a store for the purpose of making a purchase is an invitee, and the store owes a duty to the customer to exercise ordinary care to keep its premises in a reasonably safe condition. *Smithson v. Grant Co.*, 269 N.C. 575, 153 S.E. 2d 68 (1967). A store owner does not insure his customers against slipping and falling. "To hold the owner liable, plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *France v. Winn-Dixie Supermarket, Inc.*, 70 N.C. App. 492, 320 S.E. 2d 25, *disc. rev. denied*, 313 N.C. 329, 327 S.E. 2d 889 (1985).

Plaintiff contends that defendant was negligent in failing to provide a handrail and that this omission violated the State Building Code. The basic principle of law is that "a store-owner is not generally required to provide handrails on stairways, absent some building code, safety ordinance, or other special circumstances" *Hedgepeth v. Rose's Stores*, 40 N.C. App. 11, 16, 251 S.E. 2d 894, 897 (1979). The first building code was adopted in this state in 1933. Neither the original code nor subsequent revisions thereof is applicable to buildings constructed prior to that date absent a change in the use of the building. *Carolinas-Virginias Assoc. v. Ingram*, 39 N.C. App. 688, 251 S.E. 2d 910, *disc. rev. denied*, 297 N.C. 299, 254 S.E. 2d 925 (1979).

Examining the evidence before the trial court in light of these principles and without precluding other factual questions, if any, arising on the evidence that may be adduced at trial, we hold that genuine issues of material fact exist as to whether (i) defendant converted the warehouse building from storage use to mercantile use since the building code was adopted, and (ii) defendant maintained the steps in a reasonably safe condition.

For the foregoing reasons, the judgment appealed from is

Reversed.

Judges JOHNSON and EAGLES concur.

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STATE OF NORTH CAROLINA v. GREGORY KENT PARKS

No. 8514SC667

(Filed 19 November 1985)

1. Criminal Law § 66.17— in-court identification— independent origin from suggestive courtroom confrontation

Although a pretrial identification procedure at which the victim was informed by the prosecutor that her assailant would be sitting on the back row of the courtroom was suggestive, the victim's in-court identification of defendant as her assailant was of independent origin and properly admitted where the victim observed defendant in mid-morning light for about five minutes at the time of the crimes, her initial description of defendant was consistent with his actual appearance and her testimonial description of him, and the victim's description of the knife used by defendant matched the knife found in defendant's possession at the time of his arrest.

2. Criminal Law § 66.20— identification testimony— inconsistencies in voir dire testimony— no material conflict— findings not required

The trial court was not required to make findings of fact resolving inconsistencies between the testimony of an identification witness and the testimony of an officer who conducted a photographic lineup where the inconsistencies involved allegedly improper remarks by the officer; the remarks, if any, came after the witness had selected defendant's photograph; and there was thus no material conflict in the evidence.

3. Criminal Law § 66.16— in-court identification— independent origin from pretrial photographic identification

A witness's in-court identification of defendant was of independent origin and not tainted by a pretrial photographic identification where the witness saw defendant at least twice on the morning of the crime near the crime scene; the witness provided a detailed description of defendant a few hours after the crime and a detailed description of the car defendant was driving at the scene; his description of defendant's car matched the car defendant was driving when arrested; and his description of defendant prior to trial was consistent with his testimonial description of defendant.

4. Burglary and Unlawful Breakings § 5.5; Rape and Allied Offenses § 5— breaking or entering— attempted rape— sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of attempted first degree rape and felonious breaking or entering where it tended to show that the victim turned around to close her apartment door and discovered defendant standing in the breezeway near her apartment; defendant had a knife and told the victim that he wanted to have sexual intercourse with her; defendant forced open her door and, after a lengthy struggle during which the victim refused to stop screaming, fled from the scene.

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APPEAL by defendant from *Clark, Judge*. Judgments entered 29 January 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 October 1985.

Defendant was charged in a proper bill of indictment with attempted first degree rape and felonious breaking or entering. At trial the State offered evidence which tends to show that after returning from the swimming pool on the morning of 30 August 1984, the victim turned around to close her apartment door and discovered defendant standing in the breezeway near her apartment. Defendant told the victim that he wanted to have sexual intercourse with her and forced open her door. After a lengthy struggle during which the victim refused to stop screaming, defendant fled.

The jury found defendant guilty of attempted first degree rape and felonious breaking and entering. From judgments imposing consecutive nine year and three year active prison sentences, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Myron C. Banks, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for defendant, appellant.

HEDRICK, Chief Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in refusing to suppress the in-court identification of defendant by the victim. Defendant contends, specifically, that the in-court identification of defendant by the victim was irreparably tainted by a prosecution arranged pre-trial identification procedure. The victim testified that several months prior to trial, the prosecutor told her to go to the courtroom to see if she could identify her assailant. She was informed by the prosecutor that defendant would be sitting on the back row and that he would answer when his name was called. After entering the courtroom, the victim looked at the persons seated on the back row and told her husband that defendant was the man who attacked her. She did not see defendant when he stood as his name was called.

The facts and circumstances of this courtroom confrontation were suggestive. The practice of showing an accused singly and

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not as a part of a lineup for purposes of identification has been repeatedly condemned as being highly suggestive, even though it may be justified under some circumstances. *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975). No circumstances necessitated the identification of defendant in the suggestive manner used in this case.

However, an in-court identification may be admissible despite improper pretrial identification procedures if the in-court identification is reliable and has an origin independent of the improper procedure. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976). In the present case, the victim had previously observed defendant at the time of the crime and had been able to give an adequate description of him. She testified on direct examination that she observed defendant at close range in the mid-morning light for about five minutes. Her initial description of defendant was consistent with his actual appearance and her testimonial description of him. In addition, the victim's description of the knife used by defendant matched the knife found in defendant's possession at the time of his arrest. These facts are sufficient to establish the independent origin of the victim's in-court identification. Defendant's contention that the victim's in-court identification was irreparably tainted is, therefore, without merit.

We reject defendant's contention that the trial court should have resolved the discrepancies between the identification testimony of the victim and the testimony of another witness for the State, Dwight Parker. "[C]ontradictions and discrepancies in identification testimony are for the jury to resolve." *State v. Newman and State v. Newman*, 308 N.C. 231, 240, 302 S.E. 2d 174, 181 (1983).

[2] Defendant also contends that the court erred in refusing to suppress the identification evidence of State's witness, Dwight Parker. Defendant contends that the court failed to make specific findings of fact resolving the inconsistencies between Parker's testimony and the testimony of the officer conducting the photographic lineup. He also contends that the in-court identification of defendant by Parker was irreparably tainted by suggestive pre-trial identification procedures. We disagree.

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As a general rule, after a hearing on a motion to suppress the evidence, the trial court must make written findings of fact and conclusions of law. G.S. 15-977(f); *State v. Grogan*, 40 N.C. App. 371, 253 S.E. 2d 20 (1979). Specific findings of fact are not required, however, where there is no material conflict in the evidence presented at the suppression hearing. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980); *State v. Smith*, 50 N.C. App. 188, 272 S.E. 2d 621 (1980).

In the present case, Parker testified that he was shown thirty to sixty photographs and that after he selected defendant's photograph from the lineup, the officer told him that the victim had selected the same photograph. The officer testified, on the other hand, that he showed Parker eight photographs and that he did not make any statements pertaining to the victim's selection. While the two accounts of the photographic lineup are not altogether reconcilable, it is uncontroverted that the improper remarks, if any, came after Parker had selected the defendant's photograph. Thus, there was no material conflict in the evidence, and specific findings of fact were not required. *State v. Phillips, supra*; *State v. Smith, supra*.

[3] Furthermore, it is clear that the in-court identification of the defendant by Parker was of independent origin and, therefore, admissible in any event. *State v. Ford*, 65 N.C. App. 776, 310 S.E. 2d 381 (1984). Parker's observation of defendant at the scene of the attack provided him with the basis for an identification independent of the photographic lineup. Parker saw defendant at least twice on the morning of the attack. He saw defendant standing near the swimming pool and again several minutes later when defendant parked his car. Parker also testified that he was face-to-face with defendant when defendant approached him and walked toward the rear of the apartment building. Parker provided a detailed description of defendant a few hours after the attack. He also provided a detailed description of the car defendant was driving at the scene. His description of defendant's car matched the car which defendant was driving when he was arrested. In addition, Parker's description of defendant prior to trial was consistent with his testimonial description of him.

[4] In his final assignment of error defendant contends that the trial court erred in denying defendant's motion to dismiss the

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charges against him at the close of all the evidence. He contends that the charges should have been dismissed because the State's evidence was insufficient and hopelessly conflicting. We disagree.

In considering a motion to dismiss, the question for the court is whether there is substantial evidence of each essential element of the crime charged and of the defendant being the perpetrator of the crime. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). The evidence must be viewed in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Simmons*, 57 N.C. App. 548, 291 S.E. 2d 815 (1982). Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Owen*, 51 N.C. App. 429, 276 S.E. 2d 478 (1981), *cert. denied*, 305 N.C. 154, 289 S.E. 2d 382 (1982).

To support a conviction for breaking or entering and attempted first degree rape, the State's evidence must show that defendant broke or entered the victim's home with the intent to commit the felony of rape. G.S. 14-54(a); *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983); *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979); *State v. Stafford*, 45 N.C. App. 297, 262 S.E. 2d 695 (1980). In addition, the State's evidence must show that defendant had the intent to commit the crime of rape as defined by G.S. 14-27(a)(2) and that defendant committed an act which went beyond mere preparation, but fell short of the actual completion of the offense. G.S. 14-27.6; *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982); *State v. Moser*, 74 N.C. App. 216, 328 S.E. 2d 315 (1985).

Viewing the evidence in the light most favorable to the State, we find that the testimony of the victim was sufficient to permit a jury to find beyond a reasonable doubt that defendant broke and entered the victim's home with the intent to commit the felony of rape.

No error.

Judges EAGLES and COZORT concur.

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RELIABLE PROPERTIES, INC. v. J. GRAY McALLISTER, III

No. 8525DC485

(Filed 19 November 1985)

1. Contracts § 6.1— renovation of apartments—plaintiff unlicensed—directed verdict for defendant proper

In an action arising from the termination of an agreement for plaintiff to renovate and manage defendant's apartments, the trial court correctly granted summary judgment for defendant on the issue of whether the contractor licensing requirements of G.S. 87-1 applied to plaintiff. The evidence established that the renovation included the installation of new roofing; correction of dry rot; installation of new storm doors and windows; complete renovation of all apartment interiors, including new paint, wallpaper and carpet; an agent of plaintiff hired the painter, wallpaper hanger, plumber, roofer, and storm door and window installer; plaintiff's agent purchased the paint, wall coverings, carpet, and appliances; plaintiff's agent paid all of the bills for the renovation; and the renovation clearly improved already existing buildings and constituted construction within the meaning of the statute.

2. Evidence § 22.1— failure of agent to deliver security deposits—action by Real Estate Licensing Board admitted—no prejudicial error

There was no reversible error in an action arising from the termination of plaintiff's agreement to manage defendant's apartments where the court admitted testimony about disciplinary action taken by the North Carolina Real Estate Licensing Board concerning the alleged failure of plaintiff's agent to turn security deposits over to defendant. Although a previous finding of a court may not be used as evidence of the fact found in another tribunal, both the agent and another witness testified that the security deposits were not given to defendant. G.S. 8C-1, Rule 803(22) (commentary).

APPEAL by plaintiff and defendant from *Noble, Judge*. Judgment entered 24 September 1984 in District Court, BURKE County. Heard in the Court of Appeals 6 November 1985.

This is a civil action wherein plaintiff seeks to recover \$6,251.80 plus interest and costs from defendant for 1) breach of a contract to manage apartments owned by defendant and 2) a balance of \$5,865.30 advanced by plaintiff to purchase supplies, equipment, and pay other costs of the renovation of the apartments.

In its first claim, plaintiff alleged that it agreed to manage the rental of defendant's apartments, that it in fact managed these apartments, and that defendant terminated the management contract without notice and without paying the management

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fee. In its second claim, plaintiff alleged that it agreed to supervise the renovation of the apartments, that it advanced its own funds to cover some of the renovation costs, and that defendant did not reimburse it for these advancements.

Defendant filed an answer wherein, in reference to the first claim, he admitted that plaintiff managed his apartments and that he had terminated the management agreement without notice and without paying the management fee. In reference to the second claim, defendant admitted that plaintiff supervised the renovation of the apartments and denied that it advanced its own funds to cover renovation costs. Defendant also alleged a counterclaim seeking to recover an uncertain sum of money, representing tenant security deposits.

These issues were submitted to and answered by the jury as follows:

1. Did Dr. McAllister breach the rental management contract by terminating Reliable Properties, Inc. without giving a thirty day notice?

ANSWER: Yes.

2. If so, what amount of damages is Reliable Properties, Inc. entitled to recover for breach of the rental management contract?

ANSWER: \$193.25

3. Did the plaintiff, Reliable Properties, Inc. and the defendant, Dr. McAllister enter into a contract which provided that Reliable Properties, Inc. was to receive a fee of \$10,000 for renovating the set of apartments owned by Dr. McAllister?

ANSWER: Yes.

4. Did Reliable Properties, Inc. convert money of Dr. McAllister?

ANSWER: No (\$10,000). Yes (Security Deposits).

5. What amount of damages, if any, is Dr. McAllister entitled to recover from Reliable Properties, Inc.?

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ANSWER: \$1000.00.

(Answer issue 6 only if you have answered issue 5 in some amount.)

6. What amount of damages, for services rendered or materials furnished or both, if any, is Reliable Properties, Inc. entitled to have set off against any amount owed by Reliable Properties, Inc. to Dr. McAllister?

ANSWER: \$0.00.

From a judgment entered on the verdict, plaintiff and defendant appealed.

Young, Moore, Henderson & Alvis, P.A., by Laura E. Crumpler and R. Michael Strickland, for plaintiff, appellant and appellee.

Thomas, Gaither, Gorham & Crone, by James M. Gaither, Jr., for defendant, appellant and appellee.

HEDRICK, Chief Judge.

Although defendant gave notice of appeal, he did not bring forward and argue any assignments of error. Thus, defendant's appeal is abandoned.

[1] The first assignment of error brought forward and argued by plaintiff on appeal is set out in pertinent part as follows:

The trial court's granting of defendant's motion for a directed verdict on the issue of the applicability of the licensing requirements of G.S. 87-1 on the grounds that the evidence presented was insufficient to support the trial court's determination that plaintiff was a general contractor,
...

Our Courts have repeatedly held that an unlicensed contractor may not recover on a contract or in *quantum meruit*. *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983); *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). The purpose of the North Carolina licensing statute, G.S. 87-10, is to guarantee "skill, training, and ability to accomplish such construction in a safe and workmanlike fashion." *Brady*, 309 N.C. at 584, 308 S.E. 2d at 330

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(citation omitted). For the purposes of the licensing requirement, "general contractor" is defined as follows:

any person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or more

G.S. 87-1. A contractor engages in construction when he undertakes to build an entire building or improve an already existing building. *Duke University v. American Arbitration Assoc.*, 64 N.C. App. 75, 306 S.E. 2d 584, *disc. review denied*, 309 N.C. 819, 310 S.E. 2d 349 (1983); *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970).

In the present case, plaintiff argues that it was not a general contractor within the meaning of G.S. 87-1. We disagree. The evidence offered at trial established that the renovation included the installation of new roofing, correction of dry rot, installation of new storm doors and windows, and the complete renovation of all apartment interiors; including new paint, wallpaper and carpet. An agent of plaintiff, as supervisor of the renovation, hired the painter and wallpaper hanger, the landscaper, the plumber, the roofer, and the installer of storm doors and windows. She purchased the paint, wall coverings, carpet and appliances, and paid all of the bills for the renovation. Clearly, the renovation improved already existing buildings and constituted construction within the meaning of the statute. The plaintiff undertook to "superintend or manage" this construction without complying with the licensing requirements of G.S. 87-10. Thus, plaintiff was not entitled to recover from defendant on the contract or in *quantum meruit*.

We hold the trial court did not err in granting defendant's motion for a directed verdict with respect to plaintiff's first claim for relief.

[2] The second assignment of error argued on appeal concerns the admission of testimony about an investigation and disciplinary

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action taken by the North Carolina Real Estate Licensing Board concerning the alleged failure of plaintiff's agent, Connie Ward, to turn certain tenant security deposits over to defendant. North Carolina law has long prohibited the use of a previous finding of a court as evidence of the fact found in another tribunal. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962). This practice remains the same under the new evidence code. G.S. 8C-1, Rule 803 (22) (commentary). In this case, however, the admission of this evidence was not prejudicial to the interests of plaintiff, because Connie Ward and another witness testified that she did not give the security deposits to defendant. Under these circumstances, the admission of testimony about the actions of the licensing board does not constitute reversible error.

The third and fourth assignments of error argued by plaintiff concern evidence in support of defendant's counterclaim of negligence. Since the trial court granted the plaintiff's motion for directed verdict on the negligence claim, these assignments of error do not warrant discussion on this appeal.

No error.

Judges WELLS and EAGLES concur.

J. WILLIAM DEWEY v. DOLORES E. DEWEY

No. 8410DC1281

(Filed 19 November 1985)

1. Divorce and Alimony § 30— equitable distribution—contributions to home purchases—gifts to the marriage—marital property

Financial contributions by defendant wife from her separate property which were used for down payments and improvements on various homes purchased by the parties during the marriage were gifts to the marriage where there was no statement in any conveyance of an intent by defendant that such contributions be separate property, and where the homes were titled as entirety properties. Therefore, the portion of the equity in the parties' current home which was derived from defendant's contributions is marital property. G.S. 50-20(b)(2).

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2. Divorce and Alimony § 30— equal division of marital property

The evidence and findings supported the trial court's equal division of the marital property. G.S. 50-20(c).

3. Divorce and Alimony § 30— equitable distribution—marital fault

Marital fault or misconduct which does not affect the value of marital assets is not a proper factor for consideration in distributing marital property.

4. Divorce and Alimony § 30— equitable distribution—date of valuation of marital property

The trial court erred in not valuing the marital property as of the date of the parties' separation where they obtained a divorce based on separation for one year, but such error was not prejudicial where the parties will receive the same amount of property regardless of whether the marital property is valued at the time of separation or at the times found by the trial court.

5. Divorce and Alimony § 30— equitable distribution—vested pension rights—consideration as separate property—sufficient finding

Plaintiff's vested pension rights were separate property under former G.S. 50-20(b)(2) which the trial court was required to consider under G.S. 50-20(c)(1) and former G.S. 50-20(c)(5). The trial court's finding of the annual sum that plaintiff will receive from his pension satisfied the statutory requirements, and there was no additional requirement that the trial court calculate the present value of the pension.

APPEAL by defendant from *Sherrill (Russell G., III)*, Judge. Judgment entered 21 September 1983 and order entered 12 July 1984 in District Court, WAKE County. Heard in the Court of Appeals 20 August 1985.

The parties were married to each other in 1958. They separated on 19 September 1981, and the trial court granted them an absolute divorce on 22 December 1982. The equitable distribution judgment of 21 September 1983 divided the marital property equally between the parties. The trial court denied defendant's G.S. 1A-1, Rule 59 motion to amend the judgment on 12 July 1984. Defendant appealed from the judgment and the order denying her Rule 59 motion.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., and Robert S. Shields, Jr., for plaintiff appellee.

Marc W. Sokol and William E. Marshall, Jr., for defendant appellant.

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WEBB, Judge.

[1] Defendant first contends the evidence does not support the finding that the parties' residence was marital property. Defendant never excepted to this finding, so her contention is not properly before this Court for review. N.C. Rules of Appellate Procedure, Rule 10. We nonetheless consider it in our discretion.

The parties bought and lived in five different houses, one after the other, during the course of their marriage. Defendant provided some of the funds for down payments and improvements on the series of residences from her separate property. The trial court found that defendant's contributions from her separate property to the parties' real estate purchases were gifts to the marriage. This finding is supported by defendant's testimony that she freely and voluntarily contributed her funds to the marriage. Under G.S. 50-20(b)(2), "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." This statutory provision has been interpreted as creating "a presumption that gifts between spouses are marital property." *McLeod v. McLeod*, 74 N.C. App. 144, 155, 327 S.E. 2d 910, 917 (1985). Since defendant's contribution to the marital residence was a gift, and there was no statement of her intent that it be separate property, the proportion of the home equity derived from her contribution is marital property.

The same conclusion may be reached by interpreting this case in light of another provision in G.S. 50-20(b)(2). The statute in its present version provides, "Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance." This provision applies to actions pending in the District Court Division on 1 August 1983, 1983 N.C. Sess. Laws, c. 640, s. 3, which includes the present case. Although defendant cites this provision in support of her argument that her contributions are separate property, *McLeod*, *supra*, mandates a different result. "When property titled by the entireties is acquired in exchange for separate property the conveyance itself indicates the 'contrary intention' to preserving separate property required by the statute." *Id.* at 156,

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327 S.E. 2d at 918. The evidence and findings reveal that the parties purchased their residence together while they were married, so, nothing else appearing, they owned it as a tenancy by the entirety. *Freeze v. Congleton*, 276 N.C. 178, 171 S.E. 2d 424 (1970). Thus, under *McLeod*, the titling of the residence as entirety property is evidence that the parties intended it to be marital property, and this supports the trial court's finding that it was marital property.

[2] Defendant next contends the trial court's equal division of marital property was not supported by the evidence and findings. G.S. 50-20(c) requires an equal division unless the trial court, in its discretion, determines that an equal division would not be equitable. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). The party seeking a greater than equal share bears the burden of proving that an unequal division would be equitable with respect to the twelve factors listed under G.S. 50-20(c). *Id.* The evidence and findings in the present case demonstrate that both parties made substantial financial contributions to the marriage. Both parties have income continuing after the marriage, and defendant's income is currently greater than plaintiff's. In addition, defendant owns a large amount of separate property, and plaintiff does not. In these circumstances we cannot hold that the trial court abused its discretion in refusing to grant defendant a greater than equal share, particularly in light of the legislative policy favoring an equal division. Nor does the "additional evidence" set forth in defendant's brief compel an unequal division, and the trial court did not err in failing to make findings based on such minimally relevant evidence.

[3] Defendant contends the trial court erred in not finding plaintiff's extramarital affairs as a fault relevant to equitable distribution. However, marital fault or misconduct which does not affect the value of marital assets is not a proper factor for consideration under G.S. 50-20(c). *Smith v. Smith*, 314 N.C. 80, 331 S.E. 2d 682 (1985).

[4] Defendant contends the trial court erred in not finding the net value of the marital property as of the date of separation, 19 September 1981. The trial court's findings determined the 1 July 1983 value of the parties' stock holdings, and determined figures for 1 June 1983 from which the net value of the residence can be

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calculated. The present version of G.S. 50-21(b) provides that marital property shall be valued as of the date of separation if divorce was granted on the ground of one year's separation. This version of the statute applies to the instant case since the action was pending on 1 August 1983, 1983 N.C. Sess. Laws, c. 671, s. 2; *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985), and the parties obtained an absolute divorce based on one year's separation. Thus the trial court erred in not valuing the marital property as of 19 September 1981. This error has not properly been raised for review under Rule 10 of the N.C. Rules of Appellate Procedure since there are no exceptions to the findings that value the marital property as of June and July 1983. Moreover, the error is without prejudice to the parties. The trial court ordered an equal division of marital property, and there is no evidence of a wasting or depreciation of marital assets after the date of separation. Therefore defendant will be entitled to 50% of the net value of the marital property at the time it is divided, which will reflect 50% of the value of the marital property at the time of separation plus 50% of any appreciation after separation, which will be her separate property. Defendant thus will receive the same amount of property regardless of whether the marital property is valued at the time of separation or at the times found by the trial court.

[5] Defendant contends the trial court erred in failing to find the present value of plaintiff's vested pension rights. We disagree. The original version of G.S. 50-20(b)(2) stated that vested pension rights were separate property. The 1983 N.C. Sess. Laws, c. 758, amended G.S. 50-20 to make vested pension rights a form of marital property. However, this amendment is effective only where the action for divorce is filed on or after 1 August 1983, 1983 N.C. Sess. Laws, c. 811, which does not include the instant case. Accordingly, plaintiff's vested pension rights are separate property which the trial court was required to consider under G.S. 50-20(c)(1) and former 50-20(c)(5). The trial court found the annual sum that plaintiff will receive from his pension. This finding satisfies the requirements of G.S. 50-20(c). There is no additional requirement that the trial court calculate the present value of the pension.

Defendant last contends the trial court abused its discretion in denying her G.S. 1A-1, Rule 59 motion. We have examined defendant's motion and it does not contain any valid grounds

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under G.S. 1A-1, Rule 59(a)(1)-(9) for granting a new trial or amending the judgment.

Affirmed.

Judges BECTON and MARTIN concur.

MELVIN D. CHILDERS, JR. v. JOHN E. HAYES

No. 8526SC448

(Filed 19 November 1985)

1. Fraud § 12.1— action against investment advisor—dismissal proper

The trial court did not err in an action for fraud arising from defendant's investments of plaintiff's money by granting defendant's Rule 41(b) motion for dismissal where plaintiff alleged that defendant said he would transact business in a way which would give plaintiff tax advantages which plaintiff did not receive and that federal court rulings gave defendant notice of the falsity of his representations. The representations defendant made regarding future conduct did not relate to material past or existing facts and the federal court rulings did not occur until after the representations were made.

2. Fiduciaries § 1— breach of fiduciary duty by investment advisor—judgment for defendant proper

The trial court did not err by entering a judgment for defendant on a breach of fiduciary duty claim arising from defendant's investment of plaintiff's funds where the claim was essentially a negligence or malpractice claim, the evidence supported the findings, and the findings supported the conclusions.

3. Appeal and Error § 2; Fiduciaries § 1— breach of duty by investment advisor—theories not raised at trial—not supported by evidence

The trial court did not err in an action arising from defendant's investment of plaintiff's money by dismissing plaintiff's unfair and deceptive trade practices claim and by failing to find that defendant had breached his duty of loyalty and his duty to keep control of the trust property. The breach of duty and control theories were raised for the first time on appeal, there was no evidence that the conduct cited in support of those theories proximately caused plaintiff's injury, and the negligence and fraud claims out of which the unfair and deceptive trade practice claims arose were properly disposed of by dismissal or judgment for defendant.

APPEAL by plaintiff from *Grist, Judge*. Judgment entered 24 October 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 October 1985.

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This is a civil action wherein plaintiff, Dr. Melvin Childers, seeks compensation for funds entrusted to his investment agent, defendant John Hayes. Plaintiff alleged in his complaint that he is entitled to compensation because defendant's conduct constitutes common law fraud, unfair and deceptive trade practices within the meaning of G.S. 75-1.1, and negligent supervision of trust funds. Judge Grist, sitting without a jury, found facts which may be summarized as follows:

1) On 26 August 1980 plaintiff and defendant entered a trust and agency contract whereby the defendant as trustee, was given broad powers to invest all monies placed in the trust by the plaintiff in "gold, precious metal, commodities . . . and any other property as such Trustees may deem best . . . [and to invest] any place in the world and in any form or entity which the Trustees may determine."

2) Plaintiff sent defendant \$100,000 of investment funds. Ninety thousand dollars of these funds were used by defendant as trustee for plaintiff to become a participant in the Intertrade Partnership in Lausanne, Switzerland. Ten thousand dollars were retained in a separate account in Atlanta for speculative commodity trading in the United States. Plaintiff also sent defendant \$400 in January of 1981 and January of 1982 as trustee's fees.

3) As a result of Intertrade's dealings in South African Krugerrands and English pounds, all but \$600 of plaintiff's money invested in the Intertrade Partnership was lost.

4) Defendant made several trips to Switzerland and examined the business documents of Intertrade Partnership. Nothing in the records documenting transactions conducted by Frederick Thom, managing director of Intertrade Partnership, indicated to the defendant that these transactions were in any way improper.

5) The defendant entered into an offshore investment partnership in the way that he explained to the plaintiff in 1980.

From the order dismissing his fraud and unfair competition claims and judgment for defendant on his negligence claim, plaintiff appealed.

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George C. Collie, and Charles M. Welling, for plaintiff, appellant.

Roy H. Michaux, Jr., for defendant, appellee.

HEDRICK, Chief Judge.

[1] Plaintiff by his first assignment of error contends that there is no competent evidence to support the court's finding of fact that "[t]he defendant did engage in an off-shore investment partnership in the way that he represented to the plaintiff in June and July of 1980." Plaintiff further contends that this finding of fact was necessary to support the trial court's dismissal of his fraud action pursuant to G.S. 1A-1, Rule 41(b).

When a Rule 41(b) motion is made in a non-jury trial, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. *Dealers Specialties, Inc. v. Housing Services*, 305 N.C. 633, 291 S.E. 2d 137 (1982). The trial judge may weigh the evidence, find the facts and sustain defendant's Rule 41(b) motion at the conclusion of plaintiff's evidence even though plaintiff has made out a prima facie case which would have precluded a directed verdict for defendant in a jury trial. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

To make out a case of fraud, plaintiffs must show: 1) that defendant made a representation relating to some material past or existing fact; 2) that the representation was false; 3) that defendant knew the representation was false when it was made or made it recklessly; 4) that defendant made the false representation with the intention that it should be relied upon by plaintiffs; 5) that plaintiffs reasonably relied upon the representation and acted upon it; and 6) that plaintiff was injured. *Johnson v. Insurance Co.*, 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980). In support of his contention that the trial court erred in dismissing his fraud claim, plaintiff emphasizes that defendant said he would transact business in a way which would give plaintiff tax advantages which plaintiff did not receive. The representations defendant made regarding future conduct did not relate to material past or existing facts. Furthermore, the federal court rulings which plaintiff contends gave notice to defendant of the falsity of his representations did not occur until after the representations were

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made. The trial court did not commit reversible error by granting defendant's Rule 41(b) motion dismissing plaintiff's fraud claim.

[2] Plaintiff next contends that the trial court entered judgment for the defendant on the breach of fiduciary duty claim under a misapprehension of the applicable law. The heart of plaintiff's breach of fiduciary duty claim as stated in plaintiff's complaint is as follows:

19. As trustee, defendant was obligated to discharge his duties with respect to the trust with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of a similar enterprise.

20. Defendant as trustee breached his fiduciary duty with respect to the trust, in that:

a. Defendant failed to investigate and to properly supervise the transfer of plaintiff's funds in his possession to foreign third parties.

b. Defendant failed to secure confirmation or other substantiation of any trading activity.

c. Defendant failed to monitor, supervise or otherwise account for plaintiff's funds in the trust.

This claim is essentially a negligence or professional malpractice claim. Our standard of review here is quite narrow. Findings of fact made by the court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if supported by competent evidence, even though the evidence could support a contrary finding. *Curl v. Key*, 311 N.C. 259, 316 S.E. 2d 272 (1984). We have studied the voluminous record on appeal extensively. The evidence supports the findings of fact. The findings of fact support the conclusions of law.

[3] Plaintiff attempts to assign error to the trial court's failure to find that defendant breached his duty of loyalty and that defendant breached his duty to keep control of trust property. These two theories of recovery are advanced for the first time on appeal. Contentions not raised at trial may not be raised for the first time on appeal. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E. 2d 204 (1972); *Ormond v. Crompton*, 16 N.C. App. 88, 191 S.E.

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2d 405, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 194 (1972). Furthermore, there is no evidence that the conduct of defendant advanced by plaintiff in support of these two theories of recovery proximately caused the plaintiff's injury. Plaintiff also contends that the trial court erred in dismissing his unfair and deceptive trade practices claim. Plaintiff asserts that this claim derives from his fraud and negligence claim. Because the trial court's disposition of plaintiff's fraud and negligence claims was without error, the trial court did not err in dismissing plaintiff's unfair and deceptive trade practices act claim. We therefore affirm the trial court's dismissal of plaintiff's fraud and unfair trade practices claims and the judgment for defendant on plaintiff's negligence claim.

Affirmed.

Judges EAGLES and MARTIN concur.

MCCRARY STONE SERVICE, INC. A NORTH CAROLINA CORPORATION v. JAMES
ARVIL LYALLS AND BARBARA A. LYALLS

No. 8528SC264

(Filed 19 November 1985)

1. Venue § 5.1— interpretation of leasehold—no change of venue to county where land situated

Where plaintiff sought a declaratory judgment as to whether it is obligated under a quarry lease to make rental payments for rock quarried from land adjacent to the leased premises, defendants were not entitled to a change of venue as a matter of right under G.S. 1-76 from the county of plaintiff's residence to the county in which the leased property is located since the declaration sought by plaintiffs will not directly affect the title to the land.

2. Venue § 9— complaint controls venue

The form of action stated in the complaint controls venue, and the court cannot consider defendants' allegations in their counterclaim in determining venue.

ON certiorari to review order entered 4 January 1985 by *Lewis, Robert D., Judge*, in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 October 1985.

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Plaintiff filed this action seeking declaratory relief as to its obligations under a quarry lease which provided that plaintiff would pay defendants "twelve cents . . . per ton for all rock, stone and gravel weighed, sold, and removed from the leased premises" After executing the lease plaintiff purchased land adjacent to defendants' and began removing rock therefrom which it processed on defendants' land. Plaintiff seeks a declaratory judgment that it is not required to pay defendants money under the lease for rock removed from its own land.

Defendants filed an answer and counterclaim alleging that plaintiff materially breached the lease in several respects, including failure to pay money for rock removed from plaintiff's land. They asked the court to order the lease terminated and enter a judgment for damages.

With their answer and counterclaim defendants filed a motion for change of venue from Buncombe County, the county of plaintiff's residence, to Ashe County, where the leased property is situated. The trial court denied this motion, and this Court allowed defendants' petition for a writ of certiorari to review that order.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon, for plaintiff appellee.

Roberts, Cogburn, McClure & Williams, by James W. Williams and Isaac N. Northup, Jr., for defendant appellants.

WHICHARD, Judge.

[1] Defendants' sole contention is that the court erred in denying their motion for change of venue as a matter of right under N.C. Gen. Stat. 1-76. We disagree.

Since our Declaratory Judgment Act (N.C. Gen. Stat. 1-253 *et seq.*) contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. 22 Am. Jur. 2d, Declaratory Judgments Sec. 77 at 939. N.C. Gen. Stat. 1-76, in pertinent part, provides:

Actions for the following causes must be tried in the county in which the subject of the action, or some part

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thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:

(1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest

Unless defendant waives proper venue an action is local and must be tried in the county where the land lies "[i]f the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land." *Thompson v. Horrell*, 272 N.C. 503, 504-05, 158 S.E. 2d 633, 634 (1968).

Title to realty must be directly affected by the judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein It is the principal object involved in the action which determines the question

Rose's Stores v. Tarrytown Center, 270 N.C. 201, 206, 154 S.E. 2d 320, 323 (1967), *quoting* 92 C.J.S., Venue, Sec. 26, at 723-24.

In *Rose's Stores* plaintiff, lessee of a store in lessor's shopping center, brought an action in the county of its residence to enjoin defendant lessor from erecting a building that plaintiff alleged would encroach upon parking area and driveway rights guaranteed plaintiff in the lease. Applying the above test, the Court held that the trial court properly denied defendant's motion to remove the action as a matter of right under N.C. Gen. Stat. 1-76 to the county in which the land was situated. The Court reasoned:

The judgment plaintiff seeks by its complaint would not alter the terms of the lease, nor would it require notice to third parties. The only result, should plaintiff prevail, would be the personal enforcement of rights granted under a contract of lease. This is a personal right and does not run with the land. Whatever the outcome of this action, the title to the land would not be affected. The defendants would still be owners, with their title unimpaired by this suit. The complaint sounds of breach of contract and not for "recovery of real property, or of an estate or interest therein, or for the determination of any form of such right or interest, and for injuries to real property."

Id.

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Here the principal object of plaintiff's action, as formulated in its complaint, is a judicial declaration as to whether it is obligated to make rental payments for rock quarried from land adjacent to the leased premises. Such a declaration would not directly affect title to the land. As in *Rose's Stores*, defendants would retain unimpaired title and ownership. Plaintiff simply seeks an interpretation of its leasehold. "[A] controversy pertaining only to the interpretation of a leasehold does not, for venue purposes, involve the recovery of an interest in real property." 77 Am. Jur. 2d, Venue Sec. 14 at 851-52.

[2] By their counterclaim defendants seek termination of the leasehold entirely. This Court has held that an action for termination of a leasehold requires removal, under N.C. Gen. Stat. 1-76, to the county where the leased property is situated. *Sample v. Motor Co.*, 23 N.C. App. 742, 209 S.E. 2d 524 (1974). For purposes of determining venue, however, consideration is limited to the allegations in plaintiff's complaint. See *Blevens v. Lumber Co.*, 207 N.C. 144, 145, 176 S.E. 262, 262-63 (1934); see also *Thompson*, 272 N.C. at 504, 158 S.E. 2d at 634 ("The form of action alleged in the complaint determines whether a cause is local or transitory."). See contra *Sterling Commercial Corp. v. Bradford*, 32 A.D. 2d 952, 303 N.Y.S. 2d 757 (1969). In *Blevens* plaintiff sought damages for timber wrongfully cut and removed from lands in which she claimed an interest. In defendant's motion for removal to the county where the land was situated, defendant alleged that its answer would place plaintiff's title directly in issue. Applying the statutory predecessor to N.C. Gen. Stat. 1-76, the Court held that since the form of action stated in the complaint controls venue, it was precluded from considering defendant's allegation as to title when making its venue determination. Following *Blevens*, we cannot consider defendants' allegations in their counterclaim in our venue determination.

Accordingly, we hold that plaintiff properly brought this action in Buncombe County, the county of its residence, and the court properly denied defendants' motion for removal to Ashe County.

Affirmed.

Judges EAGLES and COZORT concur.

Beam v. Morrow, Sec. of Human Resources

J. RAMEY BEAM, TOMMY DILLINGER, REPRESENTING A GREEN VALLEY UNINCORPORATED ASSOCIATION OF CONCERNED CITIZENS v. DR. SARAH T. MORROW, SECRETARY OF THE NORTH CAROLINA STATE DEPARTMENT OF HUMAN RESOURCES; ET AL.

No. 8525SC445

(Filed 19 November 1985)

Appeal and Error § 6.2— action to enjoin landfill—appeal of partial summary judgment—premature

Defendants' appeal of a partial summary judgment was dismissed as premature where plaintiffs brought an action arising from the purchase of a landfill by the county; the partial summary judgment did not dispose of all the claims against all the parties, but only the claim against the commissioners and the real estate broker seeking to declare the deeds null and void; there remained for later determination at trial the recovery of the \$200,000 paid by the commissioners for the purchase of the property and questions of accounting for expenditures by the commissioners; the trial court did not determine that there was no just cause for delay; and no substantial right would be lost by waiting to appeal until after trial. G.S. 1A-1, Rule 54(b), G.S. 1A-1, Rule 54(a).

APPEAL by defendants Lacey and County Commissioners from *Ferrell, Judge*. Judgment entered 2 January 1985 in BURKE County Superior Court. Heard in the Court of Appeals 6 November 1985.

Plaintiffs brought this action as owners of real property in Avery County which adjoins a proposed sanitary landfill site and as taxpayers. The defendants are the seller of the landfill site, Harris Mining Company; the purchasers of the site, the Avery County Commissioners; the real estate broker involved, S. B. and wife Pansy Lacey; Secretary of the Department of Human Resources Dr. Sarah T. Morrow; and acting head of the Solid and Hazardous Waste Management Division of the Department of Human Resources O. W. Strickland. In their complaint filed 17 May 1984 plaintiffs alleged that the Avery County Commissioners (Commissioners) appointed Grover Wiseman (Wiseman) as the "sole authority" to pursue the matter of purchasing 200 acres from Harris Mining Company (Harris) for the development of the Avery County sanitary landfill; Wiseman made arrangements with Municipal Engineering Services Company (Municipal) for boring and surveying the property to determine whether it was

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suitable for use as a landfill; the Commissioners intentionally avoided competitive bidding requirements by dividing Municipal's fee of approximately \$20,000 into smaller payments; Municipal made no recommendation as to whether the property was suitable for use as a sanitary landfill; the Commissioners then appropriated \$200,000 of County funds to purchase the property; and on 10 March 1983 Wiseman entered into a contract with Harris to purchase the 200-acre parcel. Plaintiffs requested that the Commissioners be permanently enjoined from using any portion of the property as a sanitary landfill or for any other public purpose and that the Commissioners be directed to reimburse Avery County for all sums expended in furtherance of the purchase of the property and the application for a sanitary landfill.

On 2 July 1984 plaintiffs filed an amendment to their complaint, adding a second cause of action in which they alleged that Grover Wiseman was a County Commissioner prior to 6 December 1982 and had been employed by Harris as general custodian of 3,000 acres of property which included the 200-acre tract; Wiseman was paid by Harris to keep trespassers off the property and was allowed to use a portion of the property for farming and for cutting wood. On 6 December 1982 Wiseman was given full authority by the Commissioners to pursue the purchase of the property from Harris for the Avery County landfill; on 21 February 1983 Wiseman was made Assistant County Manager for Solid Waste; the 200-acre tract was listed by real estate agent Lacey; on 1 March 1983 Wiseman contracted with Harris to purchase the property for the County for \$200,000 (\$10,000 was already in escrow as earnest money, \$190,000 was to be paid at closing); Lacey was to receive nineteen acres in lieu of a \$8,000 commission; in July 1983 Harris received the \$200,000 and the deeds to Avery County and to Lacey from Harris were recorded. Plaintiffs requested that the sale of the property be declared void; that a receiver be appointed to take charge of the property; that Wiseman and the other Commissioners make an accounting of all sums expended in furtherance of purchasing the property; and that they reimburse such sums to the County.

On 14 August 1984 the Department of Human Resources entered into a consent agreement with Avery County whereby Avery County surrendered its solid waste permit which it had re-

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ceived on 19 March 1984 without prejudice to its right to reapply for a permit at a future date.

On 19 September 1984 plaintiffs moved for partial summary judgment. On 2 January 1985 the trial court granted plaintiffs' motion for partial summary judgment against defendants Commissioners and Lacey. The Court ruled that the contract for the sale of the land between Harris and the Commissioners violated the public policy set forth in N.C. Gen. Stat. § 14-234 (1981) and was void and that the deeds conveying the property from Harris to Avery County and to Lacey were void as a matter of law. The Court appointed a receiver to take charge of the property pending a determination on the status of Harris with respect to the property and ordered "That all other issues pending in this action be calendared for trial. . . ." Defendants Commissioners and Lacey appealed.

Long, Howell, Parker & Payne, P.A., by Ronald W. Howell and Robert B. Long, Jr., for plaintiffs appellees.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and William McBlief; Clement Miller & Whittle, by Charles E. Clement and Allen C. Moseley; and Kathryn G. Hemphill for defendants appellants County Commissioners.

G. D. Bailey and J. Todd Bailey, by J. Todd Bailey, for defendant appellant Pansy Lacey.

WELLS, Judge.

The threshold question is whether the order allowing plaintiffs' motion for partial summary judgment is appealable. "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) of the Rules of Civil Procedure. A final judgment disposes of the cause as to all the parties, leaving nothing to be determined between them in trial court. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). When more than one claim for relief is presented the court may enter a final judgment as to fewer than all the claims or parties "only if there is no just reason for delay and it is so determined in the judgment." G.S. 1A-1, Rule 54(b). See *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, appeal dismissed, 301 N.C. 92, --- S.E. 2d --- (1980). Rule 54(b) also

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permits appeal when fewer than all claims are determined if "expressly provided by these rules or other statutes." The "other statutes" are N.C. Gen. Stat. § 1-277 (1983) and N.C. Gen. Stat. § 7A-27(d) (1981), which allow an immediate appeal from a judicial determination which deprives appellant of a substantial right which he would lose if the ruling is not reviewed on appeal before final judgment. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *Leasing Corp., supra*.

In this case the partial summary judgment did not dispose of all the claims against all of the parties, but only the claim against the Commissioners and Lacey seeking to declare the contract and deed void. While the forecast of evidence before the trial court would appear to support the trial court's judgment, there remains for later determination at trial the questions of the accounting of the expenditures made by the Commissioners in connection with the purchase of the property and the application for a landfill permit and the recovery of the \$200,000 paid by the Commissioners to Harris. The trial court did not make the determination that there is no just reason for delay. Since this order is interlocutory it is appealable only if a substantial right would be lost if the order is not reviewed before final judgment. We find that defendants Commissioners and Lacey will not lose any substantial right by waiting to appeal this issue after the trial on the issues of the accounting of the expenditures and the recovery of the \$200,000. As this appeal is premature, it must be and is

Dismissed.

Chief Judge HEDRICK and Judge EAGLES concur.

CITY OF STATESVILLE, A MUNICIPAL CORPORATION v. GILBERT M. ROTH AND
SHERRILL ROTH

No. 8522SC721

(Filed 19 November 1985)

**Eminent Domain § 3; Municipal Corporations § 4.6— water and sewer lines for
manufacturing plant—condemnation for private purpose**

A city's attempt to condemn a portion of respondents' property for water and sewer lines to be installed solely for the benefit of a manufacturing plant

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on adjacent property constituted an improper use of the power of eminent domain for a private purpose. The fact that the plant will benefit the public by employing thirty people did not require a conclusion that the taking was for a public purpose.

APPEAL by petitioner from *Cornelius, Judge*. Judgment entered 3 April 1985 in Superior Court, IREDELL County. Heard in the Court of Appeals 7 November 1985.

Petitioner instituted this condemnation action seeking to acquire a portion of respondents' property for the purpose of constructing and installing a sewer storm drain, a sewer line, a water line, and a fire hydrant. In their answer respondents alleged that their property was not sought for a public purpose, but to serve the adjacent private property of Mr. Chandler Bryan. After hearing testimony of respondent, City Engineer Jack Pettit, and Bryan, the trial judge made findings of fact, and concluded that the taking was for a private purpose. From the judgment ordering petitioner's claim dismissed, petitioner appealed.

Harris & Pressly, by Gary W. Thomas and Jack R. Harris, for petitioner, appellant.

Sowers, Avery & Crosswhite, by William E. Crosswhite, for respondents, appellees.

HEDRICK, Chief Judge.

General Statute 1A-1, Rule 52(a)(1) requires, in non-jury cases, that the trial judge make specific findings of ultimate facts established by the evidence, state the conclusions of law thereon, and direct entry of the appropriate judgment. *Farmers Bank v. Brown Distributors*, 307 N.C. 342, 298 S.E. 2d 357 (1983). These findings of fact are conclusive on appeal if there is evidence to support them, even if there is evidence which might have supported findings to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979).

The trial judge made, in pertinent part, the following findings of fact:

10. That the fire hydrant that is installed on the Bryan property is served by water lines crossing the respondents' property that is described in this action and the fire hydrant

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would not be necessary were it not for the structure being built on the Bryan property.

11. That at the present time the City has no plans to extend any lines beyond the property of Chandler Bryan after it crosses the property of the respondents, unless the property owner that adjoins Chandler Bryan would request the services of the sewer line and water line at which time the City would provide the services. That as part of the agreement with Chandler Bryan the City is requiring an easement across his property to the adjoining property owner should the adjoining property owner ever request services.

12. That the property of Chandler Bryan which adjoins the respondents' property adjoins other property owned by Mr. Bryan or his company and sewer line and water line services are available from Meacham Road, which is a public [road] that fronts on property owned by Bryan Mills. Mr. Bryan could get sewer and water services from Meacham Road but because of the lay of the land there would be an expenditure of approximately \$7,500.00 to \$10,000.00 for installing a lift station to service the Bryan property which would have to be paid by Mr. Bryan, the property owner.

13. That the Bryan property has been approved for installation of a septic tank system and the permit for this has been granted should it be needed.

14. That the taking of the property described in the petitioner's Complaint and herein sought to be condemned is not necessary to the use of the petitioner and is for the purpose of allowing sewer lines, water lines and drain lines to cross respondents' property for the purpose of service to private property belonging to Chandler Bryan and not for a public use or public purpose in general.

EXCEPTION NO. 1

15. That said sewer line, water line and fire hydrant upon completion will serve the property of Chandler Bryan which adjoins the property of the respondents.

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The court concluded:

1. That the property belonging to the respondents which the petitioner is taking under the power of eminent domain does not constitute a public purpose or public use in that the primary use of the property sought to be acquired from the respondents by the petitioner is to install utilities to serve a private use.

2. In view of the above conclusion, the power of eminent domain as provided for in Chapter 40-A of the North Carolina General Statutes cannot be resorted to to acquire said property of the respondents because the same is not for public purpose or benefit, but is for a private use.

3. That the filing of the Complaint by the petitioner does not vest title in the petitioner since the taking is not for a public purpose and the property sought to be acquired by the petitioner is revested with the respondents, and respondents are entitled to a Judgment on their Counterclaim enjoining and restraining the petitioner from going upon or about the respondents' land that is described in the Complaint.

EXCEPTION NO. 2

Based upon the above Findings of Fact and Conclusions of Law,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the petitioner's Complaint be dismissed and the property sought to be acquired is revested in the respondents.

2. That the petitioner is enjoined and restrained from appropriating the respondents' land and from going upon and maintaining lines across respondents' property and they are ordered to remove the same from the property and to restore the same to its former condition.

EXCEPTION NO. 3

The finding of fact excepted to by petitioner was supported by the following evidence: Jack Pettit, City Engineer, testified that the water and sewer lines, which were to be installed in the

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easement on respondents' property, were needed to serve Bryan's plant. The fire hydrant was required only because of Bryan's plant. Pettit also said that there were no plans to extend the water and sewer lines to any other property. Clearly Pettit's testimony supports the trial court's finding that the easement would be "for the purpose of service to private property belonging to Chandler Bryan. . . ."

The only question remaining is whether this fact, that the easement was to exclusively serve Bryan, supports the conclusion that the taking was for a private use.

Under the power of eminent domain private property may only be taken for a public use. *Highway Commission v. Batts*, 265 N.C. 346, 144 S.E. 2d 126 (1965). A public use is a use by and for the government and the general public, not for particular individuals or estates. *Charlotte v. Heath*, 226 N.C. 750, 40 S.E. 2d 600 (1946). Economic benefits to the community which may be anticipated by the addition of a prospective employer are not determinative of whether the taking is for a public use. *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967).

In the instant case the trial court found that the water and sewer lines were to be installed solely for the benefit of Bryan's manufacturing plant. The court concluded that such use for one particular individual or enterprise was a private use. We agree. Petitioner's argument, that the plant will benefit the public by employing thirty people and thus contribute to the public welfare, is without merit. As our Supreme Court said in *Thornton, supra*, "The home or other property of a poor man cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community. . . ." *Id.*, 271 N.C. at 243, 156 S.E. 2d at 260.

We find that the findings of fact are supported by competent evidence, which support the conclusion of the trial court: that the taking was for a private purpose.

Affirmed.

Judges WELLS and EAGLES concur.

McMiller v. McMiller

SYLVIA McMILLER v. ROMIE McMILLER

No. 8518DC463

(Filed 19 November 1985)

Divorce and Alimony § 24.4; Contempt of Court § 7— arrearage in child support— imprisonment for civil contempt— findings inadequate

The trial court's findings of fact did not support a judgment of imprisonment for civil contempt for arrearages in child support where there was no finding relating to defendant's ability to pay the amount required to purge himself of contempt. G.S. 5A-21(a)(3), G.S. 5A-22.

APPEAL by defendant from *Bencini, Judge*. Order entered 28 March 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 31 October 1985.

On motion of the plaintiff, Sylvia McMiller, a hearing for civil contempt was held before Judge Bencini. Plaintiff alleged defendant was in arrearage for child support payments and that he had not made a payment since September 1982. Defendant acknowledged signing a voluntary support agreement in October 1977 requiring him to pay the sum of \$99.00 per month for the support of one minor child. Defendant claimed, despite being gainfully employed at all times since signing the support agreement, that he did not willfully fail to comply with the support order.

The court found that defendant owed \$8,641.00 in arrearages and ordered him jailed for civil contempt for willful failure to comply with a court order requiring support payments. The court further ordered that defendant could purge himself of the contempt only by paying one-half the arrearages, or \$4,320.50. Defendant was to be given work-release to enable him to continue to work to pay this amount.

This Court issued a writ of supersedeas on 2 May 1985 staying the execution of the sentence for contempt pending the outcome of this appeal.

Gregory L. Gorham for plaintiff appellee.

Central Carolina Legal Services, Inc., by Stanley B. Sprague for defendant appellant.

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PARKER, Judge.

Civil contempt proceedings are a proper method of enforcing orders for payment of child support. *Smith v. Smith*, 248 N.C. 298, 103 S.E. 2d 400 (1958). The purpose of civil contempt is not to punish but to coerce a defendant into compliance with the support order. See, e.g., *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). Although the power of a court to hold a violator of a court order in contempt is inherent, e.g., *Safie Mfg. Co. v. Arnold*, 228 N.C. 375, 45 S.E. 2d 577 (1948), it is limited somewhat by the requirements of G.S. 5A-21 thru 5A-25.

General Statute 5A-21 provides that a person may not be imprisoned for civil contempt unless "[t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order." G.S. 5A-21(a)(3). General Statute 5A-22 provides that the order of a court holding a person in contempt must specify how the person may purge himself of the contempt. Because these statutes relate to the same subject matter, they must be construed *in pari materia*. *Carver v. Carver*, 310 N.C. 669, 314 S.E. 2d 739 (1984). When so construed, these statutes require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt. *Bennett v. Bennett*, 71 N.C. App. 424, 322 S.E. 2d 439 (1984).

In the instant case, the trial judge found as fact only that defendant "has had the ability to pay as ordered." This finding justifies a conclusion of law that defendant's violation of the support order was willful, *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E. 2d 786 (1980); however, standing alone, this finding of fact does not support the conclusion of law that defendant has the present ability to purge himself of the contempt by paying the arrearages. See *Brower v. Brower*, 70 N.C. App. 131, 318 S.E. 2d 542 (1984).

To justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the "present ability" test defendant must possess some amount of cash, or asset readily converted to cash. For ex-

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ample, in *Teachey, supra*, defendant could pay \$4825 in arrearages either by selling or mortgaging mountain property in Virginia. *Accord Jones v. Jones*, 62 N.C. App. 748, 303 S.E. 2d 583 (1983) (defendant could not pay \$6540 in arrearages because land he owned was already heavily mortgaged).

In the case at bar, there was no finding relating to defendant's ability to come up with \$4320.50 in readily available cash. The only finding by the trial court related to defendant's past ability to pay the child support payments. No finding was made as to appellant's present ability to pay the arrearages necessary to purge himself from contempt.

The scope of review in contempt proceedings is limited to whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment. *Cox v. Cox*, 10 N.C. App. 476, 179 S.E. 2d 194 (1971). The findings of fact made by Judge Bencini in this case do not support the judgment of imprisonment for civil contempt. The record before this court is unclear as to what evidence if any was taken to show defendant's present ability or lack of present ability to pay the arrearage. Therefore, the judgment is vacated and the action remanded to the district court for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

CELIA F. SCHER v. CHARLES MICHAEL ANTONUCCI AND ROSEMARY ANTONUCCI

No. 8526SC324

(Filed 19 November 1985)

Automobiles and Other Vehicles §§ 12, 56— necessity for instruction on following too closely

The trial court erred in failing to instruct the jury that following too closely is a violation of G.S. 20-152A and is negligence *per se* in an action to recover damages incurred when defendant's car struck plaintiff's car from the rear as plaintiff prepared to advance through an intersection after stopping to allow a blind man who was crossing against the light to get across the street.

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APPEAL by plaintiff from *Lewis, Robert D., Judge*. Judgment entered 17 May 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 October 1985.

Plaintiff was driving her car in downtown Charlotte when she stopped for a red light at a major intersection. She was behind one car at the light. When the light turned green the car in front of hers crossed through the intersection. As plaintiff approached the intersection she noticed a blind man crossing the street against the light. She stopped to allow the blind man to get across the street and then prepared to advance through the intersection. A car owned by defendant-wife and driven by defendant-husband struck her car in the rear as she prepared to advance.

Plaintiff sued for damages for personal injuries allegedly caused in the collision by defendant-husband's negligence. At the close of all the evidence she requested special instructions on following too closely, which the court denied. The court instructed that defendant-husband was required to keep a proper lookout but gave no instruction on following too closely.

The jury returned a verdict for defendants. From the judgment entered on the verdict, plaintiff appeals.

DeLaney, Millette & McKnight, P.A., by Steven A. Hockfield, for plaintiff appellant.

Hedrick, Eatman, Gardner, Feerick & Kincheloe, by John F. Morris, for defendant appellees.

WHICHARD, Judge.

Plaintiff contends the court erred by failing to instruct that following too closely is a violation of N.C. Gen. Stat. 20-152(a) and is negligence *per se*. We agree.

The trial court has a "duty . . . to explain the law and apply it to the evidence on all substantial features of the case." *Board of Transportation v. Rand*, 299 N.C. 476, 483, 263 S.E. 2d 565, 570 (1980); *see also* G.S. 1A-1, Rule 51(a); *Investment Properties v. Norburn*, 281 N.C. 191, 197, 188 S.E. 2d 342, 346 (1972). The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. *Board of Transportation v. Rand, supra; Clif-*

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ford v. River Bend Plantation, 55 N.C. App. 514, 521, 286 S.E. 2d 352, 356 (1982).

N.C. Gen. Stat. 20-152(a) provides that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent" "A violation of this section is negligence *per se*, and ordinarily the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist to the rear was not keeping a proper lookout or that he was following too closely." *Burnett v. Corbett*, 264 N.C. 341, 343, 141 S.E. 2d 468, 469 (1965). "[H]owever, the fact that a following vehicle has collided with a preceding one does not compel either of these conclusions, but instead merely raises a question for determination by the jury." *Daughtry v. Turnage*, 295 N.C. 543, 546, 246 S.E. 2d 788, 791 (1978).

Here defendant-husband admitted that his car collided with the rear of plaintiff's car. This admission "permits a legitimate inference by a jury that defendant [-husband] was following plaintiff's automobile ahead more closely than was reasonable and prudent . . ." in violation of N.C. Gen. Stat. 20-152(a). *Smith v. Rawlins*, 253 N.C. 67, 69, 116 S.E. 2d 184, 185 (1960).

Citing *Royal v. McClure*, 244 N.C. 186, 92 S.E. 2d 762 (1956), defendants contend N.C. Gen. Stat. 20-152(a) is inapplicable. In *Royal* plaintiff-administratrix sued the drivers of several cars that stopped on the highway in front of her intestate's car because of heavy smoke and fog. Plaintiff alleged that, by failing to pull off the road after stopping, defendants negligently caused the ensuing collision with her intestate's car, which did not stop in time to avoid the collision. The Supreme Court held that defendants could not be found negligent for following too closely because N.C. Gen. Stat. 20-152(a) had no application to vehicles that were stopped one behind the other on the highway. *Royal*, 244 N.C. at 189, 92 S.E. 2d at 764-65.

Here, however, defendants' car was moving when it struck the rear of plaintiff's car. The accident did not occur, as defendants maintain, while the parties were stopped for a traffic signal, but occurred as traffic began to advance after the signal changed. Plaintiff does not claim that defendant-husband was negligent because he stopped at an improper place as alleged in *Royal*. Rather, plaintiff asserts that defendant-husband was negligent

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because he failed to stop a moving vehicle in time to avoid a collision. Thus, *Royal* does not control and N.C. Gen. Stat. 20-152(a) applies.

Since violation of N.C. Gen. Stat. 20-152(a) bears directly on the issue of defendant-husband's negligence, which is a substantial feature of the case, the court should have declared and explained this section in its charge to the jury. The court also should have explained that violation of this section is negligence *per se*. See *Harris v. Bridges*, 59 N.C. App. 195, 198, 296 S.E. 2d 299, 301 (1982). It had this duty irrespective of plaintiff's request for special instructions. *Investment Properties*, 281 N.C. at 197, 188 S.E. 2d at 346.

For the reasons stated, we award a new trial. We thus need not consider plaintiff's other argument.

New trial.

Judges EAGLES and COZORT concur.

GRANT & HASTINGS, P.A. v. MELISSA H. ARLIN

No. 8519DC768

(Filed 19 November 1985)

**Rules of Civil Procedure § 15.1— motion to amend answer to allege counterclaim—
denied—no abuse of discretion**

In an action for the value of legal services in which defendant made a motion to amend her answer to allege a counterclaim six months after the original action was filed, the trial judge had broad discretion to permit or deny the amendment whether the counterclaim to be alleged was compulsory or permissive, and defendant showed no abuse of that discretion in the denial of her motion. G.S. 1A-1, Rule 15.

APPEAL by defendant from *Neely, Judge*. Order entered 27 March 1985 in District Court, CABARRUS County. Heard in the Court of Appeals 7 November 1985.

This is a civil action wherein plaintiff seeks to recover \$5,107.33 for legal services rendered pursuant to a contract for such services. An answer was filed but not signed by defendant

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and signed by Alfred J. Weisbrod of Ohio on 10 January 1984. Plaintiff filed a motion to strike the answer for failure to comply with Rule 11(a) of the N.C. Rules of Civil Procedure on 30 January 1984. A second answer was filed on behalf of defendant on 15 February 1984, admitting that she entered into an attorney-client relationship with plaintiff but denying that appropriate legal services were rendered and that plaintiff was entitled to attorney's fees. This answer was filed after the time for filing an answer had expired but no objection of record appears to have been made. On 19 April 1984, plaintiff filed a motion for summary judgment which was not heard because the discovery period had not expired. On 24 April 1984, defendant filed a motion for production and inspection of documents and a set of interrogatories to plaintiff. Plaintiff answered the interrogatories on 23 May 1984. Upon completion of discovery, the motion for summary judgment was heard and entered for plaintiff on 26 July 1984. On motion of defendant, the summary judgment was stricken "as a result of the incorrect recollection of Defendant's counsel concerning the date of hearing, his mistake, his inadvertence or his excusable neglect."

On 29 August 1984, defendant made a motion to amend her answer to assert a counterclaim alleging malfeasance, negligence and fraud against plaintiff and against a third-party defendant. Subsequent to filing the motion to amend, defendant petitioned for removal to federal court based on diversity of citizenship. On 5 February 1985, the federal district court remanded the case to the district court division of the general court of justice of the State of North Carolina at Cabarrus County, finding that the removal petition "was frivolous and was in all likelihood interposed merely for the purposes of delay, harassment, or for other improper reasons" and on 4 March 1985 ordered that defendant pay plaintiff's costs in connection with the petition for removal, including attorney's fees. On 28 February 1985 defendant filed a proposed amendment to her original amendment, requesting a trial by jury and changing the allegation of damages. On 27 March 1985, Judge Neely denied defendant's motion to amend her answer to set up a counterclaim against plaintiff and to bring in a third-party defendant. From this order, defendant appealed.

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Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Richard R. Reamer, for plaintiff, appellee.

Myers, Ray, Myers, Hulse & Brown, by R. Kent Brown, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant contends that the trial judge erred in denying her motion to amend her answer to allege a counterclaim for malfeasance, negligence, and fraud. She argues that the trial court erred in finding and concluding that the counterclaim she sought to allege was a compulsory counterclaim. She argues that the counterclaim was permissive.

In *Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979) we held that a motion made pursuant to G.S. 1A-1, Rule 15 for leave of court to amend to allege a counterclaim was addressed to the sound discretion of the trial judge and the denial of such a motion was not reviewable absent a clear showing of abuse of discretion. We have also held that an order denying a motion to amend an answer was interlocutory and not immediately appealable, *Buchanan v. Rose*, 59 N.C. App. 351, 296 S.E. 2d 508 (1982), but that denial of a motion to amend to allege a compulsory counterclaim was immediately appealable under G.S. 1-277 as affecting a substantial right. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E. 2d 119, *disc. rev. denied and appeal dismissed*, 294 N.C. 736, 244 S.E. 2d 154 (1978).

In the present case, defendant made a motion to amend her answer to allege a counterclaim six months after the original answer was filed. Thus, under G.S. 1A-1, Rule 15, the trial judge had broad discretion to permit or deny the amendment, whether the counterclaim to be alleged was compulsory or permissive. Since defendant has shown no abuse of discretion on the part of the judge in denying the motion to amend, it is not necessary to decide whether the counterclaim was compulsory or permissive.

The order denying defendant's motion to amend is affirmed.

Affirmed.

Judges WELLS and EAGLES concur.

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STATE OF NORTH CAROLINA v. WILLIE JAMES TORBIT, JR.

No. 8521SC639

(Filed 19 November 1985)

1. Robbery § 4.3— attempted armed robbery—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of attempted armed robbery where it tended to show that defendant held a knife to the victim's throat, forced her over to the passenger seat of her car, threatened to "mess her up" if she gave him any trouble, and asked for and looked through her purse, and that a money clip holding cash and the victim's driver's license, which had been in the purse, was later found on the floor of the car next to the driver's seat where defendant had been sitting.

2. Kidnapping § 1.2— intent to commit robbery—sufficiency of evidence

The evidence was sufficient to permit the jury to infer an intent to rob so as to support the charge against defendant of kidnapping for the purpose of facilitating the commission of armed robbery where it tended to show that defendant forced his way into the victim's car with a knife and asked for and looked through her purse, and that a money clip holding cash and the victim's driver's license, which had been in the purse, was later found on the floor of the car next to the driver's seat where defendant had been sitting.

APPEAL by defendant from *DeRamus, Judge*. Judgments entered 6 March 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 30 October 1985.

Defendant was indicted for first degree kidnapping and robbery with a dangerous weapon. At trial the State presented evidence tending to show the following: Janice Cook was driving home from her fiancé's house at approximately 12:30 a.m. A car behind her began blinking its lights, and when she reached her home, the car pulled up beside her and the occupant asked for directions to Burlington. Cook gave him the directions, and he then asked if she would write them down. She wrote the directions down, and the man returned to his car. Cook unlocked her car and began to get out, but as she did so, the man came back and held a knife to her throat. He forced her over to the passenger seat and "told me that if I gave him any trouble he would mess me up but good."

Cook and her abductor then drove off. She asked the man what he planned to do, but he did not answer. She then asked if she could smoke. The man said no, asked Cook if she had a gun,

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and then asked for her purse. He looked through her purse and then returned it to her, and Cook did not see him take anything out of the purse. At some point the man tried to turn the car around, but got stuck in a ditch. He told Cook that he would get out of the car and push and that she should drive the car. As soon as he got out, Cook locked the doors, and the man ran off down the road. Cook then went to a nearby house and called the police. After looking through her purse she noticed that a money clip holding her driver's license and approximately \$40.00 was missing.

A short time later Cook returned to her home and identified defendant, then in custody, as the man who had abducted her. The next day while searching her car, Cook discovered the money clip with her driver's license and cash on the floor of the automobile next to the driver's seat.

Defendant was indicted for robbery with a dangerous weapon and first degree kidnapping for the purpose of facilitating the commission of the felony of armed robbery. He was found guilty of second degree kidnapping and attempted robbery with a dangerous weapon. From judgments entered on the verdicts, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sueanna P. Peeler, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant's two assignments of error both raise the issue of whether the evidence is sufficient for the jury to find that he attempted to rob Ms. Cook. He first contends that neither his words nor his conduct evidenced any intent to rob Ms. Cook, and that the charge of attempted armed robbery should not have been submitted to the jury. We disagree. The elements of attempted armed robbery are: (1) the unlawful attempted taking of personal property from another, (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means," and (3) danger or threat to the life of the victim. *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). In this case, defendant held a

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long butcher or hunting knife to Ms. Cook's throat and threatened her, according to her testimony, by saying that "if I gave him any trouble, he would mess me up but good." Ms. Cook's testimony also shows that it was her habit to keep her purse on the floor in front of the passenger seat. The jury could therefore properly infer that the money clip found on the floor in front of the driver's seat had been in the possession of defendant, who had unlawfully attempted to take it from Ms. Cook. This argument is overruled.

[2] Defendant next contends that the indictment charging him with kidnapping for the purpose of facilitating the commission of armed robbery is not supported by the evidence. He argues that the State did not prove the particular intent alleged, as it must do when an indictment alleges an intent to commit a particular felony. *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984). We again disagree. Much of the evidence would permit a jury to infer that defendant attempted to rob Ms. Cook. He forced his way into her car, asked for her purse, looked through it, then gave it back to her. There was no evidence that defendant attempted or intended to sexually molest Ms. Cook. We hold that the evidence was sufficient to submit the charge to the jury and for the jury to infer that defendant had the intent to rob Ms. Cook. This assignment of error is overruled.

Defendant had a fair trial free from prejudicial error.

No error.

Judges WHICHARD and JOHNSON concur.

IN THE MATTER OF THE ESTATE OF: RUFUS FRANKLIN OUTEN, SR., DECEASED

No. 8526SC451

(Filed 19 November 1985)

Wills § 61 — dissent — family settlement agreement invalid — only two of four beneficiaries signed

There was no error in allowing a dissent under a will where an alleged agreement between the dissenting widow and the estate was not a family settlement agreement because it was signed by only two of the four beneficiaries under the will. Family settlements are invalid unless all who receive under the will are joined in the agreement. G.S. 30-1, G.S. 30-2.

In re Estate of Outen

APPEAL by respondents from *Snepp, Judge*. Judgment entered 30 January 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 October 1985.

On 16 July 1983, Rufus Franklin Outen, Sr., died survived by his second wife, Elma K. Outen, and four children of his first marriage and leaving a will that was duly probated on 22 July 1983. Eleanor Grist O. Locke and William D. Locke were named as co-executors of the estate. The will left all of his property to his first wife and provided that this property be divided between his four children should his first wife predecease him.

On 5 August 1983 Elma Outen filed a dissent from the will. Thereafter, the assistant clerk of the superior court conducted a hearing with regard to this dissent. At the hearing, the co-executors of the estate offered into evidence an agreement allegedly entered into between the widow and the estate wherein she purportedly agreed to withdraw the dissent on the condition that she receive \$16,000 cash or one-tenth of the estate and certain items of personal property. This writing was signed by Elma Outen, one of the co-executors and two of the four beneficiaries under the will. The assistant clerk refused to admit the writing or any testimony into evidence with respect to this alleged agreement and entered an order allowing the dissent.

From this order the co-executors appealed to the judge of the superior court, who affirmed the order of the assistant clerk on 1 February 1984. Thereafter Elma Outen and the co-executors entered into a consent agreement wherein the cause was remanded to the assistant clerk of superior court to allow evidence as to whether the alleged agreement was a family settlement agreement.

After a hearing, the assistant clerk made findings of fact and conclusions of law and entered an order declaring that the alleged agreement was not a family settlement agreement and again allowed the dissent. The co-executors appealed to the judge of the superior court who affirmed the assistant clerk's decision. From this order, the co-executors appealed to this court.

Ray Rankin for dissenting spouse, appellee.

Rodney S. Toth, for respondents, appellants.

In re Estate of Outen

HEDRICK, Chief Judge.

Respondents contend that the assistant clerk erred in finding that the agreement allegedly entered into between the dissenting widow and the co-executors was not a "family settlement agreement" and in allowing the dissent pursuant to Article 1 of Chapter 30 of the General Statutes of North Carolina.

"To establish the right to dissent, a spouse must make a timely filing pursuant to G.S. 30-2, and must show an entitlement to that right under G.S. 30-1." *In re Kirkman*, 302 N.C. 164, 166, 273 S.E. 2d 712, 714 (1981). The right time, manner and effect of the filing and recording of a dissent to a will are all matters within the probate jurisdiction of the clerk of superior court. *In re Snipes*, 45 N.C. App. 79, 262 S.E. 2d 292 (1980). In discussing an appeal from a clerk with respect to a dissent, this Court held in *In re Estate of Swinson* that:

When the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test. If there is evidence to support the findings of the Clerk, the judge must affirm. If a different finding could be supported on the same evidence, the trial judge cannot substitute his own finding for that of the Clerk. It is not a *de novo* hearing. The trial court is sitting as an appellate court, since its jurisdiction is derivative.

In re Estate of Swinson, 62 N.C. App. 412, 415, 303 S.E. 2d 361, 363 (1983). Our standard of review on this appeal is the same as that of the judge of superior court.

We agree with the assistant clerk of superior court that the alleged agreement between the dissenting widow and the estate was not a "family settlement agreement," because it was never executed by all of the beneficiaries under the will. Family settlement agreements, of course, are favored by the law, *Holt v. Holt*, 304 N.C. 137, 282 S.E. 2d 784 (1981); however, such agreements are invalid unless all who receive under the will join in the agreement. *In re Will of Pendergrass*, 251 N.C. 737, 112 S.E. 2d 562 (1960). In the present case, two of the beneficiaries under the will did not sign the alleged agreement. The findings made by the

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assistant clerk of superior court clearly support her conclusion allowing the dissent of Elma Outen pursuant to G.S. 30-1, and the judge of the superior court did not err in affirming the assistant clerk's judgment. The judgment of the superior court is affirmed.

Affirmed.

Judges EAGLES and MARTIN concur.

JUDY CHEEK GREENE v. PARKER MAURICE GREENE

No. 8518DC408

(Filed 19 November 1985)

Husband and Wife § 12— ineffectiveness of oral modification of separation agreement

Modification of a separation agreement must be pursuant to the formalities and requirements of G.S. 52-10.1. Therefore, a separation agreement was not modified when plaintiff told defendant that she was making a wedding present to him upon his remarriage of all alimony payments due under their separation agreement, and defendant remained liable for the payments.

APPEAL by defendant from *Lowe, Judge*. Order entered 4 January 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 29 October 1985.

Plaintiff commenced this action on 14 October 1983 alleging a failure by defendant to make alimony payments pursuant to a separation agreement and seeking sums allegedly due. The separation agreement provided that it would survive a divorce of the parties. The parties were in fact divorced in March 1980.

The trial court heard the matter without a jury on 17 September 1984. The trial court made the following findings based upon facts as admitted and upon the pleadings as stipulated by the parties:

1. This is a civil action brought by the plaintiff against the defendant for certain sums allegedly due under the terms of the Separation Agreement entered into between the parties on September 14, 1978, which provided that the defend-

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ant would pay to the plaintiff the sum of One Hundred Dollars (\$100.00) per month from the date of the Separation until the plaintiff should die or remarry.

2. That the defendant made the payments pursuant to the Agreement to and including June 6, 1980; that at that time all payments had been paid in full; and that there were no sums due the plaintiff under the terms of the Agreement.

3. That subsequent to June 6, 1980, and prior to the date of the next payment being due from the defendant to the plaintiff, the plaintiff and defendant had a conversation during which the plaintiff stated to the defendant that she knew he had remarried, that she did not desire that he make any more payments to her under the Agreement, that she was making him a wedding present of the payments, and that thereafter the defendant made no further payments to the plaintiff.

4. That on or about October 14, 1983, the plaintiff commenced this action against the defendant for the payment of the sums allegedly due subsequent to June, 1980.

Based on these facts the trial court made the following conclusions:

* * *

2. That the plaintiff is estopped from claiming payment for any payments due from June 6, 1980, until October 14, 1983, and that the defendant has no obligation to make said payments to the plaintiff during said period.

3. That the defendant is obligated to make the payments due the plaintiff that fell due under the terms of the Agreement subsequent to October 14, 1983, pursuant to the terms of said Agreement.

Based on these findings and conclusions, the trial court ordered defendant to make all payments pursuant to the separation agreement due the plaintiff from 14 October 1983 and to continue such payments per the agreement until plaintiff dies or remarries.

From the order of the trial court, defendant appeals to this Court.

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Cahoon and Swisher, by Robert S. Cahoon, for plaintiff appellee.

Douglas, Ravenel, Hardy, Crikfield & Lung, by G. S. Crikfield and James W. Lung, for defendant appellant.

ARNOLD, Judge.

The sole issue before this Court is whether the trial court properly concluded that defendant is obligated to make alimony payments due plaintiff after 14 October 1983 pursuant to the terms of the separation agreement. Defendant appellant contends that the facts found by the trial court require a conclusion of law that plaintiff orally made an inter vivos gift to defendant of all payments due under the agreement. Defendant therefore argues that in view of this gift, the trial court erred in ordering him to make payments after 14 October 1983. We disagree.

In North Carolina the modification of the original separation agreement must be pursuant to the formalities and requirements of G.S. 52-10.1. 2 R. Lee, *N.C. Family Law* § 199 (4th ed. 1980); see also *Smith v. Smith*, 225 N.C. 189, 196, 34 S.E. 2d 148, 152-153 (1945) (re modification of separation agreements pursuant to former G.S. 52-12). G.S. 52-10.1 requires that a separation agreement be in writing and acknowledged by both parties before a certifying officer, not a party to the contract, as defined by statute.

The trial court found that the attempt to make a gift of the alimony payments occurred in conversation between the parties, and defendant makes no objection to the court's findings. Such an attempt to orally modify the separation agreement fails to meet the formalities and requirements of G.S. 52-10.1. Therefore, the findings of the trial court would not support, much less require, a conclusion that the parties modified the separation agreement when plaintiff told defendant that she was making a wedding present of the payments under the agreement.

In short, the findings of the trial court support its conclusion that defendant is obligated to make the payments due plaintiff after 14 October 1983 pursuant to the terms of the agreement and the conclusions support the court's order. We therefore affirm the order of the trial court.

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Affirmed.

Judges WELLS and PARKER concur.

JOHN C. JAMES v. CAROLYN HONEYCUTT D/B/A TOPS AND BOTTOMS AND
WILLIAM F. HONEYCUTT

No. 858SC484

(Filed 19 November 1985)

1. Negligence § 34.1— fall on loose step—contributory negligence—evidence sufficient

In an action arising from a fall by a police officer on the rear steps of defendants' store, the trial court correctly submitted contributory negligence to the jury and denied plaintiff's motion to set aside the verdict on that issue where other officers testified that they observed that the step in question was wobbly and would move, and plaintiff testified that he had been up and down the steps many times over many years and had not noticed anything wrong with the step. The jury could reasonably infer that plaintiff had climbed the steps many times before the accident and knew or should have known of the dangerous condition.

2. Negligence § 38— fall on loose step—instruction on contributory negligence proper

The trial court did not err in its instructions on contributory negligence in an action arising from a fall by a police officer on the steps of defendants' store where the court generally discussed the law relating to contributory negligence and listed the specific acts which defendants contended constituted contributory negligence.

APPEAL by plaintiff from *Strickland, Judge*. Judgment entered 5 October 1984 in Superior Court, WAYNE County. Heard in the Court of Appeals 1 November 1985.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries sustained when plaintiff fell while attempting to descend steps leading to the rear door of the retail establishment owned by defendants.

The evidence at trial tended to show that plaintiff and other officers of the Mount Olive police force, with the approval of defendants, had been checking the doors of defendants' retail establishment nightly for several years and that one of the steps

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leading to the rear entrance of this business had been "a little bit wobbly." Plaintiff testified that after checking the door on 7 February 1982, one step "turned over" while he was descending these steps and he fell, thereby injuring himself. Although plaintiff denied that he had ever observed the condition of these steps, another police officer testified that the instability was noticeable when climbing the steps.

Over the objection of plaintiff, the trial judge submitted the issue of contributory negligence to the jury. The jury found that defendants had been negligent and plaintiff had been contributorily negligent. From judgment entered on the verdict, plaintiff appealed.

Kornegay & Head, P.A., by Janice S. Head and G. Russell Kornegay, III, for plaintiff, appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Robin K. Vinson and C. Ernest Simons, Jr., for defendants, appellees.

HEDRICK, Chief Judge.

[1] By his first and third assignments of error, plaintiff contends that the trial court erred in submitting the issue of contributory negligence to the jury and denying plaintiff's motion to set aside the verdict as to this issue, because as a matter of law there was insufficient evidence to support a jury finding of contributory negligence. We disagree.

For contributory negligence to apply, it is not necessary that plaintiff have actual knowledge of the danger of injury to which his conduct exposes him; plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety. *Smith v. Fiber Controls, Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980).

In the present case, a jury could conclude, based on the evidence presented at trial, that plaintiff was aware or should have been aware of the "wobbly" condition of the step and that his injury was proximately caused by his negligent use of that step. Although plaintiff testified that he did not know of any defect in the step before the accident, Officer Vernon testified

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that he had been up and down the same steps many times before the incident in question, and that he had noticed and was aware of the fact that the step was "a little bit wobbly." Officer Colie testified that after the incident in question he examined the steps by walking up and down them and that one step would move under his weight. Plaintiff testified that he had gone up and down the steps in question many times over many years before the accident and that he had not noticed anything wrong with the step. From the evidence given in the case, the jury could reasonably infer that the step which caused plaintiff's fall was "a little bit wobbly" before the accident and had been so for a considerable period of time. The jury could also reasonably infer that plaintiff had climbed the same steps many times before the accident and the step was "a little bit wobbly" when he climbed them. From this evidence, the jury could reasonably infer that plaintiff knew or should have known of the dangerous condition of the step, and his continued use of the step when he knew or ought to have known of its condition was negligence and such negligence was a proximate cause of his fall and subsequent injury. Therefore, we hold that the trial judge was correct in submitting the issue of contributory negligence to the jury and denying the motion for judgment notwithstanding the verdict.

[2] In his remaining assignment of error, plaintiff contends that the trial court improperly instructed the jury on the issue of contributory negligence by failing to apply the law to the evidence. After generally discussing the law relating to contributory negligence, the judge listed the specific acts which defendants contended constituted contributory negligence in this case. This is not, as plaintiff argues, a case where the judge failed to relate to the jury specific acts or omissions arising from the evidence which would constitute negligence. Therefore, we hold that the court's instructions were correct.

No error.

Judges WHICHARD and JOHNSON concur.

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U. S. HELICOPTERS, INC. v. DAVID C. BLACK

No. 8520SC456

(Filed 19 November 1985)

1. Aviation § 3.1; Negligence § 30.1— helicopter crash—no negligence by student pilot

Plaintiff's evidence was insufficient for the jury to find that defendant's negligence caused the crash of a helicopter leased by plaintiff to defendant for defendant's use in learning to fly where it tended to show that defendant and his instructor were practicing a difficult maneuver; the instructor initiated the maneuver and told defendant to place his hands on the controls to feel the movements the instructor was making; the instructor relinquished the controls to defendant but defendant did not know he had done so; and the instructor, as pilot in command, was responsible for making sure that the maneuver could be completed safely.

2. Bailment § 3.3— damage to bailed property— evidence establishing lack of negligence by bailee

While plaintiff's evidence that it, as bailor, delivered an undamaged helicopter to defendant, as bailee, and that defendant returned the helicopter in a damaged condition might constitute a *prima facie* showing of negligence by defendant, plaintiff's evidence was insufficient for the jury where it went further and conclusively established a lack of negligence by defendant.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 14 February 1985 in UNION County Superior Court. Heard in the Court of Appeals 31 October 1985.

Plaintiff and defendant entered into an agreement in which plaintiff agreed to provide a helicopter to defendant for use by the defendant in learning how to fly a helicopter under the supervision and control of a certified instructor pilot. The parties agreed that the instructor would be Ron Manning, an instructor provided by defendant. The parties also agreed upon a rental charge of \$115 per hour, which defendant paid in a lump sum payment of \$5,000. On 18 September 1982, the helicopter, while occupied by defendant and Manning, crashed, causing damage to the tail section of the aircraft. Plaintiff, alleging defendant negligently caused or allowed the helicopter to crash, instituted this action seeking to recover damages arising out of the crash. At the close of the plaintiff's evidence, the court granted defendant's motion for a directed verdict. From judgment entered in defendant's favor, plaintiff appealed.

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Dawkins & Lee, P.A., by Koy E. Dawkins, for plaintiff.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe, Irvin W. Hankins, III, and Sally Nan Barber, for defendant.

WELLS, Judge.

[1] The sole issue in this appeal is whether the court erred in allowing defendant's motion for a directed verdict at the close of plaintiff's evidence. For the following reasons, we hold the court did not err in allowing the motion.

A motion for a directed verdict by a defendant presents the question of whether the evidence, taken in the light most favorable to the plaintiff, is sufficient to take the case to the jury and to support a verdict for plaintiff. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Such a motion is not properly allowed unless it appears, as a matter of law, that the plaintiff cannot recover upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977).

The evidence in the present case tends to show that Manning and defendant were using the helicopter on 18 September 1982 to allow defendant to practice executing a maneuver known as an "auto-rotation" maneuver, which student pilots must master in order to be certified as a pilot. This maneuver, one of the most difficult maneuvers required, involves a simulation of an emergency in which the pilot undertakes to land the aircraft without engine power.

Plaintiff affirmed defendant's deposition testimony that Manning had his hands on the controls when Manning initiated the maneuver and instructed defendant to "follow through," that is, to place his hands on the controls to feel the movements Manning was making. Although defendant later learned from Manning after the crash that Manning had relinquished the controls to defendant, defendant did not see or feel Manning relinquish the controls, nor did he hear Manning say he was relinquishing control.

Larry Self, a certified helicopter pilot instructor, testified as an expert witness that it is standard instructional procedure for a

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student and instructor pilot to affirmatively acknowledge transfer and receipt of controls. Defendant testified in his deposition that Manning was not in the habit of acknowledging transfer or receipt of controls. According to Federal Aviation Administration Regulations which were introduced into evidence, a "pilot in command" is "the pilot responsible for the operation and safety of an aircraft during flight time." Self testified that regardless of whether the student knows he is to be on the controls, the instructor, as the pilot in command, is ultimately responsible for making sure that the maneuver can be completed safely, which Manning failed to do.

Plaintiff's president, Creswell Horne, Jr., admitted that Manning was the pilot in command and in charge of the helicopter. After the helicopter crashed, Manning told him he "just couldn't get hold of the controls in time" to prevent the crash.

[2] The evidence, taken in the light most favorable to the plaintiff, fails to show any negligence on the part of the defendant. Notwithstanding the lack of any evidence of negligence on defendant's part, plaintiff contends that it presented a *prima facie* case of negligence requiring submission of the case to the jury when plaintiff offered evidence tending to show that it, as bailor, delivered the helicopter to defendant; that defendant, as bailee, accepted the helicopter and thereafter had control of it; and that defendant returned the helicopter in a damaged condition. See *Insurance Co. v. Cleaners*, 285 N.C. 583, 206 S.E. 2d 210 (1974). *Insurance Co.* and other cases cited by the plaintiff are distinguishable from the case at bar. Assuming that there was a bailment, a *prima facie* showing of negligence would arise by presumption. Had plaintiff's evidence consisted only of the bailment and subsequent damage by the bailee during the bailment, plaintiff's argument might prevail. Here, however, plaintiff's evidence went much further and conclusively established a lack of negligence by defendant. There must be negligence on the part of defendant for him to be found liable for the damage. See *Pennington v. Styron*, 270 N.C. 80, 153 S.E. 2d 776 (1967). It appearing, as a matter of law, that plaintiff cannot recover against defendant under any state of facts which the evidence presents, the court properly allowed defendant's motion for a directed verdict. *Manganello v. Permastone*, *supra*.

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Affirmed.

Judges ARNOLD and PARKER concur.

CHARLES L. LONG, EMPLOYEE, PLAINTIFF v. CHARLES REEVES, NON-INSURED, EMPLOYER, DEFENDANT

No. 8510IC658

(Filed 19 November 1985)

Master and Servant § 93— workers' compensation—notice of hearing not given to defendant—denial of defendant's motion for a new hearing—error

In a workers' compensation case in which defendant filed a motion for a new hearing on the ground that he had not received notice of the hearing before the Deputy Commissioner which resulted in his being ordered to pay workers' compensation to plaintiff, the Industrial Commission should have treated defendant's motion as one made pursuant to G.S. 1A-1, Rule 60(b) and, on remand, should conduct a hearing on whether defendant was afforded "reasonable notice." G.S. 97-83.

APPEAL by defendant from opinion and award of the North Carolina Industrial Commission dated 15 February 1985. Heard in the Court of Appeals 5 November 1985.

This is a proceeding under the North Carolina Workers' Compensation Act wherein plaintiff seeks to recover compensation for injuries received while working for defendant on 12 July 1982.

The record discloses that on 9 October 1984 Chief Deputy Commissioner Forrest Shuford entered an Order awarding plaintiff compensation. In the record it is noted that neither defendant nor an attorney representing him was present at the hearing. The record further discloses that defendant gave notice of appeal from the Deputy Commissioner's award to the Full Industrial Commission on 15 November 1984, and on that same day also made a motion pursuant to G.S. 97-85 and Industrial Commission Rule XXI for a new hearing on the ground that he had not received notice of the hearing before Deputy Commissioner Shuford.

On 15 February 1985 the Full Commission adopted as its own the opinion and award of Deputy Commissioner Shuford and awarded plaintiff compensation for his alleged injuries. In the

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opinion and award it is noted that defendant's motion filed on 15 November 1984 was denied. The Commission made no findings whatsoever with respect to this motion nor afforded defendant a hearing on the motion. Defendant appealed.

Speckman & Sheely, by James A. Wellons, for plaintiff, appellee.

Leonard, Shannonhouse, McNeely, MacMillan & Durham, by Thomas A. McNeely, for defendant, appellant.

HEDRICK, Chief Judge.

G.S. 1A-1 Rule 1 expressly provides that the North Carolina Rules of Civil Procedure are applicable in proceedings before the Industrial Commission.

G.S. 1A-1, Rule 60(b) provides the means whereby a defendant may be relieved of a judgment. G.S. 97-83, in pertinent part, provides: "Immediately after such application [for a hearing] has been received the Commission shall set the date of a hearing, which shall be held so soon as practicable, and shall notify the parties at issue of the time and place of such hearing." Industrial Commission Rule XX(2) provides that "[t]he Commission will give reasonable notice of hearing in every case." The only mention in the entire record regarding "notice" to defendant with respect to the hearing appears under the caption in the record "Proceedings Before Deputy Commissioner Forrest M. Shuford on September 18, 1984."

At the beginning of the proceeding the following took place:

THE COURT: Charles L. Long versus Charles Reeves. Notice of hearing was sent to Charles Reeves at 3108 Sears Road in Charlotte and it has not been returned but no one on behalf of Charles Reeves has appeared. Mr. Wellons you—I presume want to proceed anyway in the absence of the defendant?

MR. WELLONS: Yes, Your Honor, we would.

Since the North Carolina Industrial Commission has no rule comparable to G.S. 1A-1, Rule 60(b), and because the rules of civil procedure are applicable, we hold the Industrial Commission should have treated defendant's motion on 15 November 1984 as

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one made pursuant to G.S. 1A-1, Rule 60(b) "to be relieved from a judgment." We will not presume to tell the Commission whether it should proceed under G.S. 1A-1, Rule 60(b)(1), (2), (3), (4), (5) or (6). Suffice it to say, however, the Commission should conduct a hearing on defendant's motion to determine whether defendant was afforded "reasonable notice" of the hearing which resulted in his being ordered to pay compensation to plaintiff under the Workers' Compensation Act. The cause is therefore remanded for a hearing on defendant's motion pursuant to the North Carolina Rules of Civil Procedure.

Remanded.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. LACY KEYSER JACKSON

No. 8520SC371

(Filed 19 November 1985)

Criminal Law § 82— clergy-communicant privilege

In a prosecution for rape and burglary, the clergy-communicant privilege of G.S. 8-53.2 was violated by the admission of testimony by defendant's aunt, who was also a minister and the victim's mother, that defendant admitted his guilt to her during a visit with him in jail where the aunt initiated the visits to defendant and asked him about the crimes, she approached defendant as a close relative and minister, defendant's admission came after they had prayed together, and the comfort and encouragement the aunt gave defendant can fairly be described as spiritual counsel.

APPEAL by defendant from *McConnell, Judge*. Judgment entered 7 December 1984 in Superior Court, MOORE County. Heard in the Court of Appeals 17 October 1985.

Defendant was indicted for rape and burglary. The State's evidence tended to show that defendant broke into his cousin's mobile home at night and forcibly had sex with her against her will. The jury found defendant guilty of first degree burglary and second degree rape. From judgment entered on the verdict, defendant appealed.

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Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard L. Griffin, for the State.

Sherwood F. Lapping for defendant, appellant.

WEBB, Judge.

Defendant's sole assignment of error is that the trial court erred in allowing Lillian Kerns to testify with respect to statements made by defendant. Lillian Kerns is the mother of the victim. She is also the defendant's aunt, and a minister. Mrs. Kerns visited defendant several times while he was in jail. She testified in court that defendant admitted his guilt to her during these visits. Defendant now contends the admission of this testimony violated the clergy-communicant privilege of G.S. 8-53.2.

G.S. 8-53.2 provides:

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

Defendant did not waive the privilege in open court. The dispositive issue is whether he was "seeking spiritual counsel" and speaking to Kerns in her professional capacity.

Mrs. Kerns' uncontradicted testimony indicates that she initiated the visits to defendant while he was in jail, that she asked him about the crimes, and that she sought to comfort him. She approached him both as a close relative and as a minister: "I felt somewhat like a mother to him, and of course, like a Pastor. I was trying to see his feelings and try [sic] to encourage him." Defendant responded to Kerns' efforts, in her dual capacity as relative and minister, to ease his depression. "At first he denied it. I said

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okay so we would just have to keep on praying. Then of course during the last time—second to the last time I talked to him he admitted—he said, ‘I did it.’”

It is impossible to determine to what extent defendant confided in Kerns as a relative and to what extent as a minister. However, she was acting at least in part in her professional capacity. His admission came after they prayed together. The comfort and encouragement she gave him can fairly be described as spiritual counsel. In these circumstances the privilege of G.S. 8-53.2 applies. This situation is no less compelling than the only reported case under the current version of the statute, *Spencer v. Spencer*, 61 N.C. App. 535, 301 S.E. 2d 411, *disc. rev. denied*, 308 N.C. 678, 304 S.E. 2d 757 (1983). In *Spencer* the statute was held to bar a minister’s testimony concerning statements made to him during marriage counseling sessions. The statements of a defendant seeking forgiveness and solace from a minister deserve no less protection, even if the minister is also a relative.

New trial.

Judges JOHNSON and PHILLIPS concur.

REBA H. PARDUE v. THE NORTHWESTERN BANK, W. G. MITCHELL,
TRUSTEE, AND G. STACY PARDUE

No. 8523SC250

(Filed 19 November 1985)

Quieting Title § 2.2— issue of fact as to identity of prior grantee—admission of genuineness of documents not conclusive as to their veracity—summary judgment not proper

The trial court erred by granting summary judgment for defendants in an action to quiet title to real property in which plaintiff claimed a fee simple absolute interest where the property was conveyed to “Stacy Pardue” in 1971; plaintiff was married to James Stacy Pardue and had a son named Gene Stacy Pardue; Gene Stacy Pardue executed deeds of trust to secure loans from The Northwestern Bank in 1977 and 1980; James Stacy Pardue died in 1977 leaving all of his property to plaintiff; the property was sold in a foreclosure sale; plaintiff admitted the genuineness of inheritance tax reports, a bankruptcy petition, and a financial statement filed with the bank; and plaintiff had not mentioned the property or claimed a financial interest in the property in any

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of those documents. To admit that a document is genuine is to admit that it is the document it purports to be, not that the statements on the document are true, and there was an unresolved issue of material fact as to whether James Stacy Pardue or Gene Stacy Pardue was the grantee under 1971 deed.

APPEAL by plaintiff from *Wood (William Z.)*, Judge. Judgment entered 7 January 1985 in WILKES County Superior Court. Heard in the Court of Appeals 5 November 1985.

This is a civil action to quiet title to real property in which plaintiff claims a fee simple absolute interest. The property at issue was originally conveyed to "Stacy Pardue" on 3 June 1971. At that time, plaintiff, Reba Pardue, was married to James Stacy Pardue and had a son named Gene Stacy Pardue. On 11 March 1977 and 13 May 1980, Gene Stacy Pardue executed deeds of trust conveying the property at issue to a trustee to secure loans from The Northwestern Bank. On 4 July 1977 James Stacy Pardue died leaving all his property to Reba Pardue.

The property at issue in this case was sold by the trustee of the deeds of trust executed by Gene Stacy Pardue in a foreclosure sale held on 9 August 1983. Gene Stacy Pardue attacked the manner in which the trustee conducted the foreclosure sale. Summary judgment against Gene Stacy Pardue was entered 9 April 1984 because a resale of the property had been scheduled for 26 April 1984.

On 15 June 1984, Reba Pardue instituted this action. In her verified complaint she alleges that the deed to "Stacy Pardue" dated 3 June 1971 conveyed the property at issue to her husband, James Stacy Pardue, not to her son, Gene Stacy Pardue, and that she took title to the property as devisee of all her husband's property. She claims that a deed of trust executed by her son to secure a loan from The Northwestern Bank is a cloud on her title and prays that she be adjudged owner of an unencumbered fee simple interest in the property.

The trial court entered summary judgment for defendants and dismissed the action.

Pardue v. The Northwestern Bank

Beach & Correll, P.A., by Neil D. Beach, for plaintiff appellant.

Lawson R. Niles for defendant appellee, The Northwestern Bank.

W. G. Mitchell for defendant appellee substitute trustee.

WELLS, Judge.

The defendant bank and substitute trustee argue that they are entitled to summary judgment because Reba Pardue admitted that she is not the owner of the property at issue in this case. They base their contention on the fact that Reba Pardue, upon receipt of defendants' requests for admissions, admitted the "genuineness" of inheritance tax reports, a bankruptcy petition and a financial statement she filed with the defendant bank. Reba Pardue did not mention the property or claim any interest in the property on any of these documents. Contrary to the contention of the defendant bank and substitute trustee, an admission of the "genuineness" of a document is not an admission of a document's veracity. To admit that a document is genuine is to admit that it is the document it purports to be, not that the statements on the documents are true.

The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of material fact and that the movant is entitled to judgment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). Reba Pardue submitted the affidavits of some of the grantors of the 3 June 1971 deed to "Stacy Pardue." In these affidavits, the grantors assert that Reba Pardue's husband, James Stacy Pardue, was the grantee under the deed. Whether James Stacy Pardue or Gene Stacy Pardue was the grantee under the 3 June 1971 deed is an unresolved issue of material fact. Therefore, summary judgment was improvidently granted.

The judgment appealed from is reversed and the cause is remanded for further proceedings.

Chief Judge HEDRICK and Judge EAGLES concur.

Mountain View, Inc. v. Bryson

MOUNTAIN VIEW, INC. v. G. FRANK BRYSON

No. 8530SC499

(Filed 19 November 1985)

Easements § 5; Registration § 1— disclaimer of easements by necessity—requirements of writing and registration

An agreement disclaiming an implied easement by necessity is within the purview of the statute of frauds and is thus not enforceable unless in writing and properly recorded in the county where the affected land lies. G.S. 22-2.

APPEAL by plaintiff from *Pachnowski, Judge*. Summary judgment entered 5 January 1985 in Superior Court, JACKSON County. Heard in the Court of Appeals 1 November 1985.

This is a civil action wherein plaintiff, Mountain View, Inc., seeks an easement by necessity across the property of defendant, G. Frank Bryson. The uncontradicted evidence shows the following: G. Frank Bryson owned a plot of land located in Jackson County, North Carolina. By deed dated 7 December 1965, Mr. Bryson conveyed a 35.25 acre portion of the plot to Marvin and Betty Henson. Although the 35.25 acre tract does not front on any public road and Mr. Bryson used a road through his main tract to gain access to the 35.25 acre tract, Mr. Bryson and Mr. Henson orally agreed that Mr. Henson would not use the road through Mr. Bryson's main tract to gain access to the 35.25 acre tract. Instead, Mr. Henson orally agreed with his cousin to construct an access road through his cousin's property. Mr. Henson constructed the access road and used it. In 1972 Mr. Henson sold his property. After a series of conveyances, plaintiff, Mountain View, Inc., purchased the 35.25 acre tract in December of 1972. On 12 September 1983, Mountain View instituted this action for a judicially declared easement over Mr. Bryson's main tract.

From summary judgment for defendant, plaintiff appealed.

J. Edwin Henson for plaintiff, appellant.

Holt, Haire & Bridgers, P.A., by Ben Oshel Bridgers, for defendant, appellee.

HEDRICK, Chief Judge.

There are three requirements for creation of an implied easement by necessity upon severance of title: 1) conveyance of a por-

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tion of a tract of land by the owner of the entire tract; 2) before the conveyance takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest to show that it was meant to be permanent; and 3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. *Potter v. Potter*, 251 N.C. 760, 764, 112 S.E. 2d 569, 572 (1960). Mr. Bryson admits in his brief that these three requirements are met. He argues that no implied easement arises in this case because of the express oral agreement between himself and Mr. Henson that no easement would be created upon conveyance. We do not agree.

Easements are interests in land and fall within the scope of G.S. 22-2, the North Carolina Statute of Frauds. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E. 2d 286, *disc. rev. denied*, 292 N.C. 730, 235 S.E. 2d 784 (1977). Oral agreements relating to an easement reached before the creation of the easement are not directly enforceable unless they are in writing. *Shepard v. Duke Power Co.*, 140 F. Supp. 27 (1956). In *Shepard* the plaintiff attempted to prove an agreement made before the conveyance of an easement which restricted the scope of the easement. The federal court, applying North Carolina Law, held that the statute of frauds barred plaintiff's evidence. We adopt and uphold the federal court's interpretation of North Carolina Law. We see no reason why the result in the present case should be different merely because the easement before us was created by implication rather than in writing. See *Miller v. Teer*, 220 N.C. 605, 18 S.E. 2d 173 (1942).

We therefore hold that an agreement disclaiming an easement by necessity is within the purview of the statute of frauds. Such an agreement is not directly enforceable unless in writing and duly and properly recorded in the county where the land affected lies.

Summary judgment for defendant is therefore reversed.

Reversed.

Judges WHICHARD and JOHNSON concur.

Voss v. Summerfield

JANET ROUSH (SUMMERFIELD) VOSS v. GARY ALLEN SUMMERFIELD

No. 8526DC344

(Filed 19 November 1985)

Divorce and Alimony § 24.2— separation agreement—no waiver of right to seek child support

The trial court erred in concluding that defendant waived the right to receive child support from plaintiff in a separation agreement since the parties cannot by contract deprive the courts of authority to provide for the welfare of children of the marriage.

APPEAL by defendant from *Brown, Judge*. Judgment entered 3 December 1984 in MECKLENBURG County District Court. Heard in the Court of Appeals 22 October 1985.

On 26 August 1981 plaintiff and defendant entered into a separation agreement which provided for custody of their minor children, child support, alimony and property settlement. Pursuant to a complaint filed 25 May 1982 by the plaintiff, the trial court entered an order, dated 11 November 1982 *nunc pro tunc* as of 23 July 1982, granting plaintiff custody and ordering defendant to pay \$350 per month child support and to assist with medical expenses for the two children. Psychological evaluation of the parties was also ordered and a reevaluation of the custody decree was set to be heard by March 1983.

On 11 January 1983 the court ordered further psychological examination. Following these evaluations the parties agreed to settle all matters in controversy by signing an amendment to the separation agreement. The amendment provided *inter alia* that custody of the children go to the defendant, that the plaintiff waived right to further alimony in exchange for a lump sum payment from defendant and that both parties agreed not to make any claims, "now or in the future, on the other party for alimony or maintenance or support and by the execution of this agreement is barred from making any such claim in the future against the other party." On the basis of the amended separation agreement, the trial court found that suitable arrangements had been made for the support and care of the children and entered a consent order on 21 April 1983.

On 3 August 1984 defendant filed a motion to modify the consent order to provide for child support, citing various increased

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costs for supporting the children and the new burden of a lawsuit that defendant had lost. The motion was heard on 22 October 1984. The trial court admitted the amended separation agreement into evidence and concluded as a matter of law that defendant had, by the amended agreement, waived all rights to claim child support from the plaintiff. Defendant appealed.

Thomas R. Cannon, P.A., by Thomas R. Cannon and Nicki Levine, for plaintiff.

Welling & Jordan, by G. Miller Jordan, for defendant.

WELLS, Judge.

In his first assignment of error, defendant contends that the trial judge erred in concluding that defendant waived the right to receive child support from the plaintiff. We agree.

[N]o agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court.

Fuchs v. Fuchs, 260 N.C. 635, 133 S.E. 2d 487 (1963). The conclusion of law that defendant had waived his right to child support is therefore in error. It is stipulated by the parties, and the trial court's judgment shows, that the court ruled on defendant's motion to modify the consent order on the basis of the separation agreement's effect on defendant's rights. The motion was, as a result, denied without consideration of defendant's evidence on the changed circumstances of the parties. This was error and the judgment must be reversed and the cause remanded for a hearing on the evidence and findings and conclusions arising on that evidence. See *Ebron v. Ebron*, 40 N.C. App. 270, 252 S.E. 2d 235 (1979).

It is important to note that on remand the defendant, as movant, will have the burden of showing a "substantial change of circumstances affecting the welfare of the child" before the order may be modified. *Id.* Recognizably, defendant's task is rendered more difficult by the existence of the separation agreement. A

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valid separation agreement cannot be ignored or set aside by the court without the consent of the parties. *Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E. 2d 640, *disc. rev. denied*, 298 N.C. 305, 259 S.E. 2d 918 (1979). Deference due this agreement gives rise to the presumption, in the absence of evidence to the contrary, that the amount agreed upon is just and reasonable. *See id.*

Reversed and remanded.

Judges ARNOLD and MARTIN concur.

PAUL E. MICHAEL v. PHYLLIS RAY MICHAEL

No. 8522DC223

(Filed 19 November 1985)

Contempt of Court § 8— criminal contempt order in district court—appeal to superior court

G.S. 5A-17 vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt.

APPEAL by plaintiff from *Cathey, Judge*. Order entered 17 October 1984 in District Court, DAVIE County. Heard in the Court of Appeals 5 November 1985.

Randolph and Tamer, by Clyde C. Randolph, Jr., and Rebekah L. Randolph, for plaintiff, appellant.

Wilson, Degraw, Johnson & Miller, by Dan S. Johnson, for defendant, appellee.

HEDRICK, Chief Judge.

This proceeding commenced when plaintiff husband filed a complaint seeking a divorce from bed and board, and defendant wife filed an answer and counterclaim seeking divorce from bed and board, alimony pendente lite, custody of their two children, child support, and attorney fees. Judgment was entered on 15 April 1983 wherein the trial judge made findings of fact and conclusions of law, which are summarized as follows:

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That plaintiff is the supporting spouse as defined in G.S. 50-16.1(4) and defendant is the dependent spouse as defined in G.S. 50-16.1(3); that plaintiff's reasonable monthly expenses are \$500.00; that \$1,200.00 per month is a reasonable amount of child support considering the incomes, estate and expenses of the parties; that \$600.00 per month alimony pendente lite is reasonable considering the incomes, estate and expenses of the parties; that plaintiff is to maintain the mortgage payments on their house in the amount of \$1,279.29 per month; that plaintiff's income in 1980 was in excess of \$83,000.00; that plaintiff's income in 1981 was in excess of \$45,000.00; that plaintiff filed a financial statement with Southern National Bank showing total assets of \$567,500.00, and a salary and commission of \$75,000.00 for 1982; that plaintiff ceased operating his business in December 1982 and did not seek additional employment until February 1983.

On 13 June 1983 plaintiff was ordered to appear and show cause as to why he should not be held in contempt of court for willful failure to pay defendant pursuant to the order entered on 6 April 1983. Plaintiff was subsequently found in civil contempt. On 28 February 1984 a second order to show cause was filed, and plaintiff was found in civil contempt again.

On 17 October 1984, the trial court conducted a hearing upon a third motion to show cause. After hearing evidence the court made findings of fact and concluded that plaintiff was in criminal contempt for his failure to comply with the previous orders of the court. Plaintiff was ordered imprisoned in the Davie County Jail for thirty days. From this order of the District Court plaintiff gave notice of appeal to the North Carolina Court of Appeals.

Plaintiff's appeal to this Court was from an order finding him in criminal contempt under G.S. 5A-11(a)(3) for willful disobedience of, resistance to, or interference with a court's lawful order. G.S. 5A-17 provides:

A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial officer inferior to a superior court judge is by hearing de novo before a superior court judge.

Michael v. Michael

This statute vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt.

Plaintiff's appeal from Judge Cathey's order of 17 October 1984 is dismissed.

Judges WELLS and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 NOVEMBER 1985

APPERSON v. WILKINS No. 8526SC410	Mecklenburg (84CVS9097)	Affirmed
CATAWBA CHIROPRACTIC CORP. v. BARE No. 8523SC425	Wilkes (82CVM865) (82CVS578)	Affirmed
CHASE v. RUMFELT No. 8527SC674	Gaston (83CVS1305)	Affirmed
CLIPPARD v. WELDON MACHINE WORKS No. 856SC564	Halifax (79CVS734)	No Error
DEEKS & CO. v. BORG-WARNER ACCEPT. No. 8526DC415	Mecklenburg (82CVD7203)	Affirmed
DODSON v. DRIGGERS No. 8511DC690	Lee (84CVM724) (84CVD962)	Reversed
FREEDOM HALL APARTMENTS v. VINES No. 857DC659	Edgecombe (85CVD83)	Reversed
HEFNER v. HEFNER No. 8525DC493	Catawba (80CVD1927)	Affirmed
IN RE DAVID No. 8527DC745	Gaston (85J55) (3350-85-0078)	Affirmed in part; reversed in part
IN RE MILLS No. 8518DC436	Guilford (83J213)	Affirmed
IN RE YOUNG No. 8512SC434	Cumberland (84J266)	Reversed & Remanded
JOYNER v. JOYNER No. 857SC262	Nash (82SP120)	Affirmed
JOYNER v. LUFKIN RULE CO. No. 8510IC747	Indus. Comm. (977999)	Affirmed
OLIN v. PICCOLA'S ITALIA, INC. No. 8510IC680	Indus. Comm. (002664)	Affirmed
POWELL v. POWELL No. 8526DC655	Mecklenburg (84CVD338)	Vacated & Remanded

STATE v. BARRIER No. 853SC270	Craven (84CRS3973) (84CRS3974)	No Error
STATE v. BISHOP No. 856SC697	Hertford (83CRS3277)	Remanded for resentencing
STATE v. BOONE No. 8518SC750	Guilford (82CRS31559) (82CRS52891) (82CRS54638) (82CRS62537)	Dismissed
STATE v. BOWLING No. 8510SC689	Wake (83CRS56324) (83CRS56325)	No Error
STATE v. BROWN No. 855SC530	New Hanover (84CRS19756) (84CRS19757)	No Error
STATE v. DAVIS No. 858SC266	Wayne (84CRS1569)	No Error
STATE v. GARY No. 854SC640	Onslow (84CRS17811)	No Error
STATE v. GAULDIN No. 8515SC304	Alamance (83CRS16374)	No Error
STATE v. GRAVES No. 8518SC608	Guilford (84CRS81101)	No Error
STATE v. HALL No. 851SC638	Chowan (84CRS324)	No Error
STATE v. HARVEY No. 853SC236	Craven (83CRS12204)	No Error
STATE v. HENRY No. 8510SC701	Wake (83CRS88527)	Dismissed
STATE v. HOGANS No. 852SC704	Beaufort (84CRS6872)	Affirmed
STATE v. McANINCH No. 8528SC724	Buncombe (82CRS25999) (82CRS26001)	No Error
STATE v. McQUEEN No. 8521SC664	Forsyth (81CRS3466) (81CRS13635)	Judgment Arrested; No Error

STATE v. MACKEY No. 8526SC634	Mecklenburg (84CRS56650) (84CRS56647)	84CRS56647—1st count—remanded for resentencing. 2nd count—new trial. 84CRS56650—1st count—remanded for resentencing. 2nd count—new trial.
STATE v. PHILLIPS No. 8526SC196	Mecklenburg (83CRS39068)	No Error
STATE v. POTTS No. 8526SC698	Mecklenburg (84CRS52596)	New trial with re- spect to the convic- tion for sale or de- livery of cocaine; no error with re- spect to the convic- tion for possession with the intent to sell or deliver cocaine.
STATE v. QUEEN No. 8530SC591	Jackson (84CRS1379)	No Error
STATE v. ROSENBAUM No. 853SC455	Pitt (84CRS6348) (84CRS6349)	No Error
STATE v. TAYLOR No. 8514SC356	Durham (83CRS4334)	New Trial
STATE v. WHITE No. 8517SC525	Caswell (84CRS1671) (84CRS2261) (84CRS2262)	No Error
STATE v. WILSON No. 8526SC583	Mecklenburg (84CRS31481)	No Error
WALLACE v. FRANKLIN No. 851SC8	Dare (84CVS182)	Affirmed in part; reversed in part and remanded
WILKES v. WILKES No. 853DC54	Pitt (84CVD632)	Affirmed
WILKINSON v. WILKINSON No. 8514DC486	Durham (82CVD2399)	Affirmed

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ANALYTICAL INDEX

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ADVERSE POSSESSION**§ 3. Hostile Character of Possession as Affected by Belief that Land Is Included in Description of Claimant's Deed**

The rule that there is no adverse possession when one possesses property under the mistaken belief that the property is his does not apply where possession is under color of title. *Brittain v. Correll*, 572.

§ 17.1. What Constitutes Color of Title; Deeds Generally

A deed purporting to convey the property in dispute to respondents as part of a larger tract constituted sufficient color of title. *Brittain v. Correll*, 572.

§ 24. Actions; Competency and Relevancy of Evidence

Evidence concerning cultivation, payment of rent, cutting of wood and hunting was relevant to the issue of adverse possession. *Livermon v. Bridgett*, 533.

AGRICULTURE**§ 8. Civil Liabilities in General**

The trial court did not err in an action to enjoin a hog farming operation as a nuisance by denying defendants' motion for summary judgment where the action was not based on changed circumstances in the locality. *Mayes v. Tabor*, 197.

APPEAL AND ERROR**§ 6.2. Finality as Bearing on Appealability**

Plaintiff's appeal in her action for equitable distribution was dismissed as interlocutory. *Brown v. Brown*, 206.

An interlocutory order requiring plaintiff to pay into court disputed rentals which he had collected was not immediately appealable. *Rivenbark v. Southmark Corp.*, 225.

A preliminary injunction prohibiting a town from annexing certain property and prohibiting a county from condemning the property was a nonappealable interlocutory order. *Yandle v. Mecklenburg County; Mecklenburg County v. Town of Matthews*, 660.

Defendants' appeal of a partial summary judgment was dismissed as premature in an action to enjoin construction of a landfill. *Beam v. Morrow, Sec. of Human Resources*, 800.

§ 6.3. Appeals Based on Venue

Appeal from the denial of a motion for a change of venue as a matter of right was not premature. *Smith v. Mariner*, 589.

§ 6.9. Appealability of Preliminary Matters and Mode of Trial

A party may appeal from an interlocutory order imposing sanctions by striking his defense and entering judgment as to liability. *Vick v. Davis*, 359.

§ 16.1. Limitations on Powers of Trial Court

The trial court lacked jurisdiction to enter an additional judgment while the case was on appeal. *Smith v. Barfield*, 217.

§ 24. Necessity for Objections, Exceptions and Assignments of Error

Defendant may not raise the question of the granting of plaintiffs' motion for directed verdict on defendant's counterclaims for the first time on appeal. *Mills v. New River Wood Corp.*, 576.

APPEAL AND ERROR — Continued**§ 31.1. Timeliness of Objections**

Defendant's argument that the court erred in failing to give equal stress to its contentions and erred in the instructions on the burden of proof will not be considered on appeal where defendant failed to object to the charge at trial. *Mills v. New River Wood Corp.*, 576.

§ 68.2. Law of the Case; Decisions as to Sufficiency of Evidence

The Court of Appeals' prior determination that the evidence was sufficient to submit to the jury on the question of an insurance company's liability under agency principles was the law of the case where plaintiff presented substantially the same evidence at the second trial. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 475.

ARMY AND NAVY**§ 1. Generally**

Plaintiff husband has a present obligation to designate his former wife as beneficiary under his military retirement annuity plan pursuant to his agreement to do so in a separation agreement and a consent order, even though at the time the separation agreement and consent order were signed, federal statutes prohibited the designation of a former spouse as beneficiary of military retirement benefits. *Rockwell v. Rockwell*, 381.

ARREST AND BAIL**§ 3.5. Legality of Warrantless Arrest for Burglary and Related Offenses**

An officer had probable cause to arrest defendant for possession of burglary tools when he found defendant in a truck behind a closed grocery store late at night. *S. v. Locklear*, 414.

§ 9. Right to Bail in General

The trial court did not abuse its discretion by denying defendant's request for the court to set bond where the evidence available to the court prior to trial tended to show first degree murder. *S. v. Allen*, 142.

ARSON AND OTHER BURNINGS**§ 4.1. Sufficiency of Evidence**

The evidence was sufficient to submit the charge of fraudulently setting fire to a dwelling house to the jury. *S. v. James*, 219.

The evidence of defendant's identity was sufficient in a prosecution for felonious burning of a medical center and felonious breaking or entering. *S. v. O'Neal*, 600.

§ 4.2. Insufficiency of Evidence

There was insufficient evidence to permit the jury to find beyond a reasonable doubt that defendant intended to burn a building at the time he broke or entered it where the type of smoke grenade used was not a true pyrotechnic in that it did not produce a flame and was not used for incendiary purposes. *S. v. O'Neal*, 600.

ASSAULT AND BATTERY

§ 13.1. Competency of Evidence Showing Motive or Intent

Evidence of defendant's prior assaults on the victim and other members of his family was competent to show his intent or motive, and evidence of ill will between the victim and defendant was competent to rebut defendant's testimony that the victim was the aggressor and that he stabbed the victim in self-defense. *S. v. Blalock*, 201.

§ 14. Sufficiency of Evidence Generally

The evidence was sufficient to support defendant police officer's conviction of communicating threats to the driver and a passenger in a car while the officer was investigating the occupants of the car because of an alleged traffic violation. *S. v. Dixon*, 27.

§ 14.5. Assault with Deadly Weapon Inflicting Serious Injury; Sufficiency of Evidence

There was sufficient evidence to support defendant's conviction for assault with a deadly weapon inflicting serious injury. *S. v. Simpson*, 586.

§ 17. Verdict

The trial court did not err in refusing to set aside a verdict of guilty of assault with a deadly weapon inflicting serious injury on the ground that large metal rings worn by defendants were not deadly weapons. *S. v. Torres*, 345.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

The evidence supported the court's findings that defendant attorney followed plaintiff client's instructions in disbursing funds received from a fire insurance settlement to plaintiff's son with the exception that defendant was to pay \$9,000 of the proceeds to plaintiff but plaintiff only received \$2,700. *McGee v. Eubanks*, 369.

An attorney's breach of a provision of the Code of Professional Responsibility would not in and of itself be a basis for civil liability. *Ibid*.

AUTOMOBILES AND OTHER VEHICLES

§ 12. Following Vehicles

The trial court erred in failing to instruct the jury that following too closely is negligence per se in an action to recover damages incurred when defendant's car struck plaintiff's car from the rear as plaintiff prepared to advance through an intersection after stopping to allow a blind man to cross the street against the light. *Scher v. Antonucci*, 810.

§ 112.2. Homicide; Evidence of Defendant's Speed

A witness in a manslaughter prosecution had a sufficient opportunity to observe defendant's automobile to permit him to testify as to its speed. *S. v. Green*, 429.

§ 114. Homicide; Instructions

The trial court did not err in a prosecution for involuntary manslaughter and driving under the influence by failing to instruct the jury on the contributory negligence of the passengers in defendant's car in that they voluntarily accepted a ride with a visibly drunken driver. *S. v. Hollingsworth*, 36.

AUTOMOBILES AND OTHER VEHICLES — Continued

The jury in a prosecution for involuntary manslaughter and driving under the influence arising from an automobile accident should have been instructed to consider the possibility that the negligence of the driver of a car with which defendant collided was an insulating cause of the deaths of the two passengers in defendant's car. *Ibid.*

§ 121. Driving under the Influence; "Driving" within Purview of Statute

The court did not err by denying defendant's motion to dismiss the charge of driving while impaired where defendant was found upon a street behind the wheel of a motionless car with the engine running. *S. v. Fields*, 404.

§ 126.2. Driving under the Influence; Blood Tests Generally

A blood alcohol test performed on blood seized from an unconscious defendant who had not been arrested did not violate his constitutional rights. *S. v. Hollingsworth*, 36.

§ 126.3. Driving under the Influence; Time of Administering Breathalyzer Test

The fact that three hours passed from the time defendant operated a vehicle until a breathalyzer test was given goes to the weight rather than the admissibility of the breathalyzer evidence. *S. v. George*, 470.

§ 126.5. Driving under the Influence; Statements of Defendant

The trial court in a prosecution for driving while impaired did not err by failing to suppress defendant's admission that he had taken 72 sleeping pills with a can of beer. *S. v. George*, 580.

§ 127.1. Driving under the Influence; Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of driving while impaired because on the date in question he "had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.10 or more." *S. v. George*, 470.

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence the charge of driving while impaired. *S. v. George*, 580.

§ 127.2. Driving under the Influence; Sufficiency of Evidence of Identity of Defendant as Driver

The State's circumstantial evidence in a prosecution for driving while impaired and driving while license was revoked was sufficient to support a jury finding that defendant was the driver of a car when it left the road. *S. v. Dula*, 473.

§ 127.3. Driving under the Influence; Insufficiency of Evidence

There was insufficient evidence to convict defendant of driving while impaired. *S. v. Trexler*, 11.

§ 130.1. Driving under the Influence; Verdict upon Conviction for Subsequent Offenses

Defendant was not unconstitutionally imprisoned because his sentence for driving while impaired was enhanced by use of a D.U.I. conviction which occurred prior to the effective date of the Safe Roads Act. *S. v. George*, 470.

AVIATION**§ 3.1. Injury to Persons in Flight; Actions**

Plaintiff's evidence was insufficient for the jury to find that defendant's negligence caused the crash of a helicopter leased by plaintiff to defendant for defendant's use in learning to fly. *U. S. Helicopters, Inc. v. Black*, 827.

BAILMENT**§ 3.3. Liability of Bailee to Bailor; Sufficiency of Evidence**

Plaintiff's evidence that it delivered an undamaged helicopter to defendant and that defendant returned the helicopter in a damaged condition was insufficient for the jury where plaintiff's evidence went further and conclusively established a lack of negligence by defendant. *U. S. Helicopters, Inc. v. Black*, 827.

BILLS OF DISCOVERY**§ 5. Inspection of Writings**

The trial court did not err in a prosecution for possession of cocaine with intent to sell or deliver and delivery of cocaine by refusing to order production of an officer's "scribbled" notes from which he made a typewritten statement. *S. v. Callahan*, 164.

BOUNDARIES**§ 10.2. Admissibility of Evidence Aliunde in Particular Cases**

Although it was permissible under G.S. 8C-1, Rule 704 for a surveyor to state his opinion as to the location of a boundary, the trial court did not err in allowing the surveyor to state his opinion only as to the boundaries on the official court map and in excluding testimony locating the boundaries on private maps. *Livermon v. Bridgett*, 533.

§ 13. Maps

Even if private maps should have been admitted for illustrative purposes, exclusion of the maps was not prejudicial since petitioners' witnesses were allowed to illustrate their testimony on the official court map. *Livermon v. Bridgett*, 533.

§ 15. Effect of Verdict and Judgments Generally

The Rules of Evidence applied in a trial of a boundary dispute after the Rules went into effect although the matter had been heard before the referee before the Rules went into effect. *Livermon v. Bridgett*, 533.

§ 15.1. Sufficiency of Evidence and Findings to Support Judgment

The evidence in a boundary proceeding supported a verdict that the boundaries were as contended by respondents. *Livermon v. Bridgett*, 533.

BROKERS AND FACTORS**§ 1.1. Real Estate Brokers**

The trial court erred by granting summary judgment for plaintiffs and by not rendering partial summary judgment for defendants where plaintiffs conveyed real property to defendant financial manager to sell for their benefit and plaintiffs sued to recover defendants' fee. *Hayman v. Stafford*, 154.

BROKERS AND FACTORS — Continued**§ 4.1. Liabilities of Real Estate Brokers to Principals**

The issue of a real estate agency's negligence should not have been submitted to the jury in an action for negligence and breach of contract arising from water damage to a vacant house listed with the agency. *Sabol v. Parrish Realty of Zebulon, Inc.*, 680.

BURGLARY AND UNLAWFUL BREAKINGS**§ 5. Sufficiency of Evidence Generally**

The trial court properly instructed the jury on the doctrine of possession of recently stolen property although the victim was unable to identify money found in defendant's possession as money stolen from her home. *S. v. Fair*, 641.

§ 5.1. Sufficiency of Evidence; Identification of Defendant as Perpetrator

The evidence of defendant's identity was sufficient in a prosecution for felonious breaking or entering and felonious burning. *S. v. O'Neal*, 600.

§ 5.5. Sufficiency of Evidence of Breaking or Entering

The State's evidence was sufficient to support defendant's conviction of felonious breaking or entering with the intent to commit rape. *S. v. Parks*, 778.

§ 5.11. Sufficiency of Evidence of Breaking or Entering and Rape

There was sufficient evidence of an entry to support a conviction for burglary. *S. v. Berryman*, 396.

§ 6.2. Instructions on Felonious Intent

There was insufficient evidence to permit a jury to find beyond a reasonable doubt that defendant intended to burn a building at the time he broke or entered it. *S. v. O'Neal*, 600.

§ 6.4. Instructions on Breaking or Entering

The evidence was sufficient to convict defendant of breaking or entering with the intent to commit a felony where the evidence clearly showed that a window was broken on each of three occasions and a smoke grenade placed on the window-sill or just inside the window. *S. v. O'Neal*, 600.

CARRIERS**§ 3. Transfer of Operating Authority**

The trial court erred by denying plaintiff's motion for summary judgment and by granting summary judgment for defendant on its own motion in an action arising from the purchase by defendant of plaintiff's ICC operating authority to engage in interstate trucking operations. *N. C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 149.

§ 5.1. Rates and Tariffs for Motor Carriers

The Utilities Commission erred by approving a common carrier's proposed tariff for the shipment of textiles corresponding to the individually negotiated terms of a contract. *State ex rel. Utilities Comm. v. Tar Heel Industries, Inc.*, 75.

CLERKS OF COURT**§ 1. Authority Generally**

The clerk had statutory authority to extend the time for plaintiff to file the complaint for a period in addition to the original twenty-day extension. *Williams v. Jennette*, 283.

COMPROMISE AND SETTLEMENT**§ 1.1. Validity and Conclusive Effect**

The trial court correctly granted summary judgment for defendant in an action arising from a construction dispute where plaintiff pled settlement and release as a bar to defendant's counterclaim. *Bolton Corp. v. T. A. Loving Co.*, 90.

CONSTITUTIONAL LAW**§ 10.3. Delegation of Judicial Power to Administrative Agencies**

The assessment of a fine against plaintiff for operating a vehicle on the highway in excess of its licensed weight violated Art. IV, § 1 of the Constitution of North Carolina. *Young's Sheet Metal and Roofing, Inc. v. Wilkins, Comr. of Motor Vehicles*, 180.

§ 24.7. Service of Process on Foreign Corporations and Nonresident Individuals

Defendant had insufficient minimum contacts with North Carolina to satisfy constitutional due process where defendant was organized under the laws of Delaware, maintained service centers in New York and New Jersey, had sales representatives in New York, New Jersey and Texas, and advertised in trade journals distributed in New York, New Jersey, Pennsylvania and Massachusetts. *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 637.

The dismissal of plaintiff's claim against one defendant for lack of sufficient minimum contacts did not violate the open courts clause of the North Carolina Constitution because plaintiff's claim against that defendant was separate and distinct from claims against other defendants. *Ibid.*

§ 30. Discovery; Access to evidence and Other Fruits of Investigation

The trial court did not err by denying defendant's motion for police reports of the arresting officers. *S. v. White*, 45.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err in a prosecution for murder by denying defendant's motions for the appointment of a private investigator. *S. v. Allen*, 142.

§ 48. Effective Assistance of Counsel

A defendant convicted of kidnapping, armed robbery, and conspiracy did not have effective assistance of counsel at his sentencing hearing. *S. v. Davidson*, 540.

§ 49. Waiver of Right to Counsel

The trial judge's failure to make a check mark on a waiver of counsel form opposite the statement that defendant "executed the waiver in my presence after its meaning and effect have been fully explained to him" did not invalidate defendant's waiver of counsel. *S. v. Baker*, 465.

The trial court erred in allowing defendant to proceed pro se without giving her the instructions provided in G.S. 15A-1242. *S. v. Lyons*, 565.

CONSTITUTIONAL LAW — Continued**§ 51. Delays Between Arrest and Indictment**

Defendant was not denied his constitutional right to a speedy trial by a five-month delay between arrest and indictment and an additional eight-month delay between indictment and trial. *S. v. Heath*, 264.

Defendant was not denied his constitutional right to a speedy trial by a nine and one-half month delay between his indictment and trial. *S. v. Bare*, 516.

§ 74. Self-Incrimination Generally

When a defendant presents expert testimony in support of his claim of insanity, the prosecution's psychiatrist may testify in rebuttal as to statements made by, or information obtained from, the defendant in the course of his examination of defendant without violating defendant's Fifth Amendment right against self-incrimination. *S. v. Jackson*, 491.

CONTEMPT OF COURT**§ 8. Appeal and Review**

G.S. 5A-17 vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt. *Michael v. Michael*, 841.

CONTRACTS**§ 6.1. Contracts by Unlicensed Contractors**

The trial court correctly granted summary judgment for defendant on the issue of whether statutory contractor licensing requirements applied to plaintiff in an action arising from the termination of an agreement for plaintiff to renovate and manage defendant's apartments. *Reliable Properties, Inc. v. McAllister*, 783.

§ 27.1. Sufficiency of Evidence of Existence of Contract

The trial court properly submitted an issue as to a contract implied in fact in an action to recover for labor and materials provided by plaintiff in the construction of a house owned by his in-laws and intended for use by his wife. *Hall v. Mabe*, 758.

§ 29.5. Measure of Damages; Interest

The trial court did not err in awarding prejudgment interest for breach of a covenant in a timber deed. *Mills v. New River Wood Corp.*, 576.

CORPORATIONS**§ 8. Authority of President and Power to Bind the Corporations**

Summary judgment was properly granted for plaintiff against the individual defendant in an action by a supplier of building materials where defendant's corporate charter had been suspended before the deliveries for which plaintiff claimed payment and defendant's president had signed the company checks for payments on the account. *Pierce Concrete, Inc. v. Cannon Realty & Construction Co.*, 411.

COUNTIES**§ 5.1. Validity of Zoning Ordinances**

Genuine issues of material fact were presented as to whether Union County has a comprehensive plan for zoning and whether the rezoning of defendants' property from R-10 to R-8 constituted unlawful contract zoning. *Willis v. Union County*, 407.

CRIME AGAINST NATURE**§ 1. Elements of the Offense**

The statute which prohibits taking indecent liberties with children is not unconstitutionally vague and overbroad. *S. v. Strickland*, 454.

CRIMINAL LAW**§ 4. Distinction between Crimes**

Solicitation to commit common law robbery is not an "infamous" misdemeanor punishable as a Class H felony under G.S. 14-3(b). *S. v. Mann*, 654.

§ 5. Insanity

When a criminal defendant gives notice that he will raise insanity as a defense, the trial court has the inherent power to require defendant to submit to a mental examination by a psychiatrist for the prosecution for the purpose of inquiring into his mental status at the time of the alleged offense. *S. v. Jackson*, 491.

§ 5.1. Determination of Issue of Insanity

The evidence did not require an instruction on the defense of temporary insanity where defendant's only evidence of insanity was his testimony to the effect that, upon finding his wife in a motel room with two men, he "lost his mind" and "was all to pieces." *S. v. Davis*, 68.

When a defendant presents expert testimony in support of his claim of insanity, the prosecution's psychiatrist may testify in rebuttal as to statements made by, or information obtained from, the defendant in the course of his examination of defendant without violating defendant's Fifth Amendment right against self-incrimination. *S. v. Jackson*, 491.

§ 7.5. Compulsion

The trial court did not err in a prosecution for trafficking in heroin by possession and transportation and possession with intent to sell cocaine by confining its instruction on the defense of duress to threats against defendant and his family. *S. v. White*, 45.

§ 14. Commission of the Offense within the State

The trial court did not err by refusing defendant's requested jury instruction on jurisdiction in a prosecution for possession of cocaine with intent to sell or deliver and delivery of cocaine. *S. v. Callahan*, 164.

§ 22. Arraignment Generally

The absence of formal arraignment in a prosecution for possessing cocaine with intent to sell or deliver and delivery of cocaine did not amount to reversible error. *S. v. Callahan*, 164.

§ 23.4. Revocation or Withdrawal of Plea

There was no error in a prosecution for possession of cocaine with intent to sell and sale and delivery of cocaine where the trial court rejected defendant's plea arrangement without granting a continuance or giving defendant an opportunity to modify the arrangement. *S. v. Martin*, 61.

§ 26.5. Double Jeopardy; Same Acts Violating Different Statutes

Defendant's right against double jeopardy was not violated by his convictions for felonious breaking or entering and felonious larceny pursuant to that breaking or entering. *S. v. Waller*, 184; *S. v. Hensley*, 192.

CRIMINAL LAW — Continued**§ 29.2. Mental Capacity to Stand Trial; Commitment of Defendant**

The superior court, rather than the district court, had authority to enter a commitment order to determine defendant's capacity to stand trial even though indictments had not yet been returned. *S. v. Jackson*, 491.

§ 34.4. Admissibility of Evidence of other Offenses

An identification card fraudulently obtained from the DMV that was dropped by defendant when police approached was properly admitted to connect defendant with money also dropped by defendant even though it may have shown defendant's commission of another crime. *S. v. Fair*, 641.

§ 34.7. Admissibility of Evidence of other Offenses to Show Intent or Motive

Evidence of defendant's prior assaults on an assault victim and other members of his family was competent to show defendant's intent or motive. *S. v. Blalock*, 201.

The trial court did not err in a prosecution for forging checks on the account of John Bowman by admitting evidence that defendant was arrested on another occasion at another bank with a savings deposit book on an account he had opened there in the name of John Bowman. *S. v. Shipman*, 650.

The trial court did not err in a prosecution for robbery with a dangerous weapon by admitting evidence that defendant had pled guilty to an offense in U.S. District Court the day before the robbery, that sentencing had been deferred, and that defendant had been told to have the money for a fine with him on the rescheduled hearing date. *S. v. Spinks*, 657.

§ 34.8. Admissibility of Evidence of other Offenses to Show Common Plan or Scheme

In a prosecution for communicating threats, testimony concerning defendant's altercation with one witness sixteen months prior to the incident in question and his altercation with another witness two days before the incident did not come within the exception permitting evidence of other crimes or misconduct to show a common plan or scheme. *S. v. Dixon*, 27.

The trial court did not err in a prosecution for robbery with a firearm and assault with a shotgun by admitting testimony that defendant and an accomplice on a prior occasion had used a shotgun to abduct, rob, and take the automobile of the witness. *S. v. Belton*, 559.

§ 38. Evidence of Like Facts and Conditions

The trial court did not err in a prosecution for armed robbery of a Domino's Pizza delivery person by allowing the owner of the Domino's to testify as to an earlier incident with defendant. *S. v. Bartow*, 103.

§ 42.6. Articles Connected with Crime; Chain of Custody or Possession

In a prosecution for possession of cocaine with intent to sell or deliver and delivery of cocaine, the evidence was sufficient to establish a proper chain of custody as to a white powder. *S. v. Callahan*, 164.

§ 48.1. Silence of Defendant as Incompetent

Any error in the admission of a police officer's testimony that defendant declined to make any statement after being warned of his Miranda rights was not prejudicial. *S. v. Fair*, 641.

CRIMINAL LAW — Continued**§ 50. Expert Testimony in General**

The trial court did not err in a prosecution for possessing, manufacturing and trafficking in marijuana and methaqualone by allowing two S.B.I. agents to testify as experts. *S. v. Watts*, 124.

§ 50.1. Admissibility of Opinion Testimony

Testimony by a clinical psychologist that nothing in the thirteen-year-old victim's record or current behavior indicated a mental condition which would cause her to fabricate her story of sexual assault was not testimony relating to character prohibited by Rule of Evidence 405(a) but was proper opinion testimony on mental condition. *S. v. Heath*, 264.

§ 53. Medical Expert Testimony in General

Testimony by a pediatrician concerning symptoms of rape trauma syndrome related to him by an alleged rape victim was not admissible under G.S. 8C-1, Rule 803 but was inadmissible hearsay where his examination of the victim was conducted only in preparation for trial. *S. v. Stafford*, 19.

§ 53.1. Medical Expert Testimony as to Cause of Death

The State did not err in a prosecution for murder by admitting over a general objection the testimony of an assistant medical examiner regarding the cause of death. *S. v. Hamilton*, 506.

§ 62. Lie Detector Tests

The trial court did not err by admitting the results of a polygraph examination and the polygraphist's accompanying testimony in a case tried before State v. Grier. *S. v. Williams*, 136.

§ 66.9. Suggestiveness of Photographic Identification Procedure

The trial court did not err in a prosecution for armed robbery by not suppressing an out-of-court photographic identification of defendant by the victim where the photographs had been altered by drawing eyeglasses on each picture to conform to the victim's description of the robber and defendant was the only person pictured having cuts and bruises on his face and wearing dark clothes. *S. v. Bartow*, 103.

The pretrial photographic procedures from which a grocery store manager identified defendant were not unduly suggestive and conducive to a likelihood of irreparable misidentification. *S. v. Williams*, 136.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

A witness's in-court identification of defendant was of independent origin and not tainted by a pretrial photographic identification. *S. v. Parks*, 778.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving other Pretrial Identification Procedures

Although a pretrial identification procedure at which the victim was informed by the prosecutor that her assailant would be sitting on the back row of the courtroom was suggestive, the victim's in-court identification of defendant was of independent origin and properly admitted. *S. v. Parks*, 778.

§ 66.20. In-Court Identification; Findings on Voir Dire

The trial court was not required to make findings of fact resolving inconsistencies in voir dire testimony where the inconsistencies involved alleged improper

CRIMINAL LAW — Continued

remarks by an officer after the witness had selected defendant's photograph. *S. v. Parks*, 778.

§ 69. Telephone Conversations

The trial court did not err in a prosecution for trafficking in a controlled substance by permitting a tape recording of a conversation between an informant and defendant to be played to the jury and by requiring defendant to give a voice exemplar by reading from a transcript of the tape. *S. v. Ruiz*, 425.

§ 71. Shorthand Statements of Fact

Testimony by a witness that she saw defendant go to "I would say what looks like room fifty-one" was competent as an instantaneous conclusion of the mind. *S. v. Davis*, 68.

A witness's testimony that the victim "looked just like his ribs were stomped in" and that the victim "won't very strong" were admissible based on the witness's knowledge of the victim and her perceptions. *Ibid.*

§ 73.2. Statements Not within Hearsay Rule

There was no error in a prosecution for possession and delivery of cocaine in admitting statements not made by defendant regarding efforts to find cocaine. *S. v. Stallings*, 375.

§ 73.4. Spontaneous Utterances

There was no error in a prosecution for trafficking in a controlled substance where one of the arresting officers testified that defendant was driven back to his home to make arrangements for his children and a woman there became excited and said that she had told him he would get caught. *S. v. Ruiz*, 425.

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by admitting testimony that a bystander said, "Don't cut that man." *S. v. Simpson*, 586.

§ 74.2. Confession by or Implicating Codefendant

The trial court did not violate defendant's G.S. 15A-927 right of confrontation in denying defendant's motion for a mistrial because of the admission of a codefendant's incriminating statement in a joint trial to the effect that the three defendants had been deposited near the crime scene after hitchhiking. *S. v. Waller*, 184.

§ 75.1. Voluntariness of Confession; Effect of Fact that Defendant Is in Custody

The trial court did not err in a prosecution for felonious assault and breaking or entering by denying defendant's motion to suppress his inculpatory statement where the court's findings that no promises by officers induced defendant to make his statement and that defendant changed his mind and said he wanted to talk on his own initiative after asking for an attorney were supported by competent evidence in the record. *S. v. Carruthers*, 611.

§ 75.9. Volunteered Statements

The trial court did not err in the murder prosecution of an off-duty police officer for the killing of a black man by admitting custodial statements by the officer that he believed the law in Anson County did not prevent the killing of blacks. *S. v. Hamilton*, 506.

§ 75.10. Confession; Waiver of Constitutional Rights Generally

There was no error in the admission of defendant's custodial statement in a prosecution for rape. *S. v. Dixon*, 763.

CRIMINAL LAW — Continued**§ 82. Privileged Communications**

In a prosecution for rape and burglary, the clergy-communicant privilege of G.S. 8-53.2 was violated by the admission of testimony by defendant's aunt, who was also a minister and the victim's mother, that defendant admitted his guilt to her during a visit with him in jail. *S. v. Jackson*, 832.

§ 84. Evidence Obtained by Unlawful Means

The trial court did not err in a prosecution for possessing, trafficking and manufacturing marijuana and methaqualone by allowing the introduction of a signed consent to search form. *S. v. Watts*, 124.

In a prosecution for trafficking in heroin by possession and transportation and possession with intent to sell cocaine, statements made by defendant to police were not inadmissible on the grounds that defendant was seized in violation of the Fourth Amendment where the officers approached defendant in an airport and nothing in the facts suggested that defendant had any objective reason to believe that he was not free to end the conversation and continue on his way. *S. v. White*, 45.

§ 85.2. Character Evidence; State's Evidence Generally

Evidence that the victim was afraid of her father because he was mean was admissible in a prosecution for incest. *S. v. Barnes*, 212.

§ 86.2. Impeachment of Defendant; Prior Convictions Generally

The trial court erred in allowing the State to cross-examine defendant concerning four convictions more than ten years old. *S. v. Hensley*, 192.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

In a prosecution of a law officer for communicating threats, cross-examination of defendant concerning his alleged prior uses of excessive force was permissible for impeachment purposes. *S. v. Dixon*, 27.

There was no error in a prosecution for possessing, manufacturing, and trafficking in marijuana and methaqualone where the court allowed the district attorney to bring to the attention of the jury that defendant had been arrested for possession of marijuana after the offenses for which he was being tried, despite an agreement that the arrest would not be raised. *S. v. Watts*, 124.

§ 88.1. Conduct and Scope of Cross-Examination Generally

The trial court did not err in permitting the State to ask a police officer leading questions on cross-examination concerning his observations of the appearance and emotions of a witness at the time he gave a prior inconsistent statement. *S. v. Davis*, 68.

There was no prejudice in a prosecution for possessing, trafficking and manufacturing marijuana and methaqualone from the court's refusal to permit defendant to elicit during cross-examination of several State's witnesses exculpatory statements made by defendant. *S. v. Watts*, 124.

§ 89.3. Corroboration of Witness; Prior Consistent Statements

A witness's credibility need not be impeached for prior consistent statements to be admissible to corroborate the witness. *S. v. Lane*, 741.

CRIMINAL LAW — Continued**§ 89.4. Corroboration and Impeachment of Witness; Prior Inconsistent Statements**

There was no prejudice in the trial court's refusal to give an instruction on prior inconsistent statements in a prosecution for burglary and rape. *S. v. Berryman*, 396.

Prior inconsistent statements of the driver of a stolen truck were admissible for impeachment purposes but not as substantive evidence in the prosecution of a passenger in the truck for felonious possession of stolen property. *S. v. Bartlett*, 747.

§ 89.6. Impeachment of Witness

Evidence of pending civil litigation filed by one prosecuting witness against the defendant in a criminal case was admissible to show bias or interest of the prosecuting witnesses. *S. v. Dixon*, 27.

§ 89.10. Impeachment of Witness; Witness's Prior Criminal Conduct and Convictions

The trial court did not err in a prosecution for robbery with a firearm and assault with a deadly weapon by permitting the State to cross-examine defendant's accomplice regarding prior statements and a prior offense. *S. v. Belton*, 559.

§ 91. Speedy Trial

The trial court's failure to make findings of fact when ruling on a motion to dismiss on speedy trial grounds does not constitute reversible error when it is apparent that the court determined that the State carried its burden of proof under G.S. 15A-703(a), and defendant's statutory speedy trial rights were not violated in this case when certain periods are excluded for time pending certain motions and the time between a motion to quash and the date to which the case was continued to permit the State to file new bills of indictment. *S. v. Waller*, 184.

Defendant's statutory speedy trial motions for dismissal were properly denied. *S. v. White*, 45.

The trial court properly granted a continuance to the State and properly excluded the time of the continuance from the statutory speedy trial period when two witnesses failed to arrive from California because they had received threatening telephone calls. *S. v. Bare*, 516.

§ 91.1. Continuance

The trial court's finding that continuances were granted "for the reasons above" constituted a sufficient recitation of the court's reasons for finding that the ends of justice served by granting the continuance outweighed the best interests of the public and defendant in a speedy trial, and the 155-day delay caused by the continuances was properly excluded from the statutory speedy trial time limits. *S. v. Heath*, 264.

§ 91.6. Continuance on Ground that Certain Evidence Has Been Unavailable

There was no error in the trial court's denial of a motion to continue a prosecution for breaking and entering and rape where the only ground given in support of the motion was the unavailability of certain non-testimonial identification test results. *S. v. Cofield*, 699.

§ 92.4. Consolidation of Offenses Held Proper

The trial court did not err by consolidating charges of burglary and rape arising out of incidents on 6 August 1982 and 26 July 1983. *S. v. Berryman*, 396.

CRIMINAL LAW — Continued**§ 99.2. Trial Court's Expression of Opinion by Conduct during Trial**

The trial judge's action in asking to meet with a medical witness in chambers following his testimony did not constitute a prejudicial expression of opinion on the credibility of the witness. *S. v. Heath*, 264.

§ 99.5. Trial Court's Expression of Opinion; Admonition of Counsel

The court did not err in admonishing defendant's attorney to keep her comments to herself when the attorney improperly remarked on a witness's testimony. *S. v. Torres*, 345.

§ 99.6. Trial Court's Expression of Opinion; Remarks in Connection with Examination of Witnesses

The trial court did not express an opinion as to the credibility of a witness. *S. v. Barnes*, 212.

The trial court in a prosecution for incest did not express an opinion as to defendant's character and as to defendant's defense. *Ibid.*

§ 101. Conduct of Jurors

The trial court did not err in denying defendant's motion that the court examine a juror concerning whether the juror may have engaged in improper conduct during a trial recess or in the denial of defendant's alternative motion to replace the juror with an alternate. *S. v. Jackson*, 491.

§ 101.4. Conduct During Jury's Deliberation

The trial court did not abuse its discretion in refusing the jury's request to have a transcript of the trial where the transcript was not yet available. *S. v. Green*, 429.

§ 102. Argument of Counsel

There was no prejudice in a prosecution for possessing, manufacturing and trafficking in marijuana and methaqualone where the court reporter failed to record the opening and closing arguments of counsel. *S. v. Watts*, 124.

Defendant was not deprived of the right to the opening and closing argument in a prosecution for possessing, manufacturing and trafficking in marijuana and methaqualone where he was required to place into evidence certain photographs in order to use them for illustrative purposes during cross-examination of a State's witness. *Ibid.*

§ 102.5. Counsel's Conduct in Cross-Examining Defendant

There was no prejudicial error in a prosecution for breaking and entering and rape where the prosecutor cross-examined defendant in a manner which allegedly insinuated to the jury the prosecutor's opinion of defendant's credibility. *S. v. Co-field*, 699.

§ 102.6. Particular Conduct in Argument to Jury

The court erred in allowing the prosecutor over defense objections to hold a pellet gun up to the view of the jury during his closing arguments and to refer to the gun when the gun had not been offered or admitted into evidence. *S. v. Torres*, 345.

§ 112.1. Instructions on Reasonable Doubt

The trial court did not err in refusing to give defendant's requested instruction on reasonable doubt. *S. v. McCullers*, 433.

CRIMINAL LAW — Continued**§ 113. Jury Instructions; Statement of Evidence**

There was no prejudicial error in the trial court's summary of the evidence in a prosecution for selling cocaine where the court inaccurately or incompletely summarized the evidence. *S. v. Stallings*, 375.

§ 113.1. Jury Instructions; Summary of Evidence

Failure of the trial judge to summarize defendant's evidence was not plain error. *S. v. Heath*, 264.

The trial court did not err in failing to summarize evidence favorable to defendant which tended only to impeach the State's witnesses. *S. v. McCullers*, 433.

§ 114.4. Court's Prejudicial Expression of Opinion in Statement of Evidence

Defendant was entitled to a new trial for breaking and entering where the court impermissibly expressed an opinion and stated a material fact not in evidence during the jury instructions. *S. v. Carruthers*, 611.

§ 122.1. Jury's Request for Additional Instructions

The trial court did not err in a prosecution for robbery with a dangerous weapon where the jury requested reinstruction on the definitions of robbery with a firearm and common law robbery and the court reinstructed on the definitions of the offenses but refused to reinstruct that mere possession of a firearm did not by itself constitute endangering the life of the victim. *S. v. Bartow*, 103.

§ 122.2. Additional Instructions upon Failure to Reach Verdict

The trial court did not err in a prosecution for armed robbery and second degree kidnapping in its instructions to the jury on further deliberations where the jury deliberated for one hour and fifteen minutes, then returned to the courtroom with one juror stating that she could not in good conscience come to the same conclusion as the rest of the jury. *S. v. Moore*, 553.

§ 128.2. Particular Grounds for Mistrial

The trial judge did not abuse his discretion in a prosecution for possessing, manufacturing, and trafficking in marijuana and methaqualone by denying defendant's motion for a mistrial where the district attorney asked defendant whether he owned any weapon even though the judge had earlier instructed the State not to question defendant on that subject. *S. v. Watts*, 124.

The trial court did not abuse its discretion in a prosecution for felonious larceny by denying defendant's motion for a mistrial after an officer testified that defendant had numerous charges in the records division. *S. v. Glover*, 418.

The trial court did not abuse its discretion in granting defense counsel's motion for a mistrial in a prosecution for assault on a school teacher when the prosecutor asked defendant a question on cross-examination relating to her state of mind at the time she murdered her husband, even though defendant stated that she wanted the trial to proceed. *S. v. Lyons*, 565.

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

The trial court did not err in denying defendant's motion to set aside the verdict on the ground that testimony by the State's expert witness was insufficient to rebut evidence presented in support of defendant's plea of insanity. *S. v. Jackson*, 491.

CRIMINAL LAW — Continued

§ 138. Severity of Sentence

The trial court erred when sentencing defendant for six felony counts of possession of cocaine by refusing to consider evidence of defendant's honorable discharge from the armed services without a copy of defendant's discharge. *S. v. Hanes*, 222.

The trial court did not err in sentencing defendant by failing to find as a mitigating factor that defendant had been a person of good character and had a good reputation in the community in which he lived. *Ibid.*

The trial court erred in sentencing defendant by finding as nonstatutory aggravating factors that defendant had engaged in a pattern of criminal conduct over an extended period of time and that defendant's guilty pleas indicated that he was a big time drug dealer where there was no evidence of criminal activity or drug dealing apart from activity related to his guilty pleas. *Ibid.*

The trial court improperly considered the same evidence for two different aggravating factors where the court found the statutory aggravating factor that defendant had prior convictions for offenses punishable by more than sixty days confinement and also found nonstatutory aggravating factors relating to specific prior offenses. *S. v. Hensley*, 192.

Evidence of the first and near fatal wound to the victim's abdomen was sufficient to sustain defendant's conviction for assault with a deadly weapon inflicting serious injury, and evidence that defendant inflicted two additional wounds upon the victim could be considered in sentencing without violating the proscription against use of evidence necessary to prove an element of the offense. *S. v. Blalock*, 201.

The trial court properly found as an aggravating factor that an assault with a deadly weapon inflicting serious injury was especially heinous, atrocious or cruel. *Ibid.*

The trial court erred in failing to find the statutory mitigating factor that defendant had been honorably discharged from the armed services. *S. v. Heath*, 264.

Two prior convictions for uttering forged paper could be used to aggravate sentences imposed for robbery and assault even though the uttering offenses occurred after the robbery and assault. *S. v. McCullers*, 433.

The same factors may properly be used to aggravate more than one conviction. *Ibid.*

The Court of Appeals could not determine the basis of a trial judge's statement while sentencing defendant for trafficking in cocaine that defendant had not complied with G.S. 90-95(h)(5) (1981) in assisting the prosecutor and the matter was remanded for a new sentencing hearing. *S. v. Perkerol*, 292.

The trial court did not err by sentencing defendant to two consecutive seven year terms for conspiring to traffic in cocaine and trafficking in a controlled substance by possession. *S. v. Ruiz*, 425.

The trial judge did not err in failing to find as a mitigating factor for assault with a deadly weapon inflicting serious injury that defendants' intoxication reduced their culpability for the crime. *S. v. Torres*, 345.

The court did not err in failing to find as a mitigating factor that defendant's limited mental capacity reduced his culpability for the crime on the basis of a statement by defense counsel that defendant was a "Willie M. child" who never received treatment. *Ibid.*

CRIMINAL LAW — Continued

The trial court did not err in sentencing a defendant convicted of assault with a deadly weapon inflicting serious injury to a term of five years rather than the presumptive term of three years. *S. v. Carruthers*, 611.

The dismissal of rape and sexual offense charges against defendant did not show that defendant's act of incest with his sixteen-year-old stepdaughter was with her consent so as to require the court to find as a statutory mitigating factor for incest that defendant's victim was more than sixteen years old and consented to defendant's conduct. *S. v. Elliott*, 647.

The trial court did not err in failing to find as a non-statutory mitigating factor that defendant had a good work record. *Ibid*.

The trial court erred in finding as an aggravating factor for breaking or entering and larceny that the victim was very old. *S. v. Fair*, 641.

A sentence for second degree murder could not be aggravated by a contemporaneous conviction of kidnapping. *S. v. Jackson*, 491.

The trial court did not err in failing to find as mitigating factors for second degree murder that the crime was committed under compulsion and that there was provocation by the victim and an extenuating relationship between defendant and the victim. *S. v. Bare*, 516.

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury by striking out the words "significantly" and "strong" from the mitigating factors that defendant committed the offense under a threat which was insufficient to constitute a defense but significantly reduced culpability and that defendant acted under strong provocation. *S. v. Simpson*, 586.

The trial court erred when sentencing defendant for rape by finding the non-statutory aggravating factor that defendant choked the victim until she was unconscious after committing the rape. *S. v. Cofield*, 699.

Physical or emotional injury in excess of that normally present in an offense may be considered a factor in aggravation, although a certain degree of emotional injury is inherent in all rape. *Ibid*.

The trial court did not err in relying upon convictions more than ten years old for property crimes and traffic offenses in finding prior convictions as an aggravating factor. *S. v. Lane*, 741.

The trial court did not err in failing to find in mitigation that defendant acted under duress, that defendant acted under strong provocation, or that defendant reasonably believed his conduct was legal. *Ibid*.

The trial court did not err in failing to find that the two factors in mitigation outweighed the one factor in aggravation. *Ibid*.

§ 138.11. Different Punishment on New or Second Trial

The trial court did not err when resentencing defendant by adding the condition as a recommendation that defendant's fine and restitution be paid before any early release. *S. v. Hanes*, 222.

§ 142.3. Particular Conditions of Suspended Sentence; Conditions Held Proper

The trial court did not err by requiring as a condition of a suspended sentence that a defendant convicted of possession and delivery of cocaine pay \$600 to the SBI as restitution for money used to buy drugs. *S. v. Stallings*, 375.

§ 163. Necessity of and Time for Making Exceptions and Objections to Charge

Defendant could not assign error to the court's instruction defining and applying the law of aggression in a murder prosecution where defendant did not specifi-

CRIMINAL LAW — Continued

cally request any instructions on the subject and indicated that he had no corrections or additions other than those previously requested. *S. v. Hamilton*, 506.

Defendant did not properly raise on appeal in a murder case questions as to the jury instructions on excessive force, burden of proof, and accident. *Ibid.*

The court's failure to summarize testimony that the prosecutrix had asked a defense witness to testify falsely against defendant was not plain error since it bore only on the subordinate issue of the credibility of the prosecutrix. *S. v. Elliott*, 647.

The submission to the jury of an issue as to defendant's guilt of an offense greater than that for which he has been properly indicted is plain error. *S. v. Jackson*, 491.

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit

The sufficiency of the evidence to support charges of felonious breaking or entering and felonious burning of a building was not reviewed under Chapter 15A because defendant failed to preserve any assignments of error under the Rules of Appellate Procedure; however, the Court of Appeals considered the appeal under Rule 2 of the Rules of Appellate Procedure. *S. v. O'Neal*, 600.

§ 169.5. Harmless Error in Admission of Evidence

There was no prejudice in an action for felonious child abuse in the admission of testimony that a social worker had previously had occasion to be in defendant's household where there was sufficient evidence to sustain defendant's conviction without that testimony. *S. v. Watkins*, 325.

There was no prejudicial error in an action for felonious child abuse where a nurse treating the victim stated that she got sick when asked what she did during the child's treatment for burns. *Ibid.*

§ 175.2. Discretionary Orders during Trial

The trial court did not abuse its discretion in a prosecution for robbery with a dangerous weapon by denying defendant's motion for a recess to enable him to locate a witness. *S. v. Williams*, 136.

DEATH**§ 9. Wrongful Death; Compromise and Settlement**

The trial court erred by granting summary judgment for defendant in an action in which plaintiff sought to exclude her former husband from all rights to the estate of their deceased daughter, which consisted of a wrongful death settlement, on the grounds that he had wrongfully abandoned her. *Lessard v. Lessard*, 97.

DEEDS**§ 24. Covenants against Encumbrances**

Summary judgment was properly entered for plaintiff in an action arising from the sale of a subdivision lot by defendant developers where defendants violated the covenant against encumbrances by failing to construct a water line required by the City for a certificate of occupancy. *First American Federal Savings and Loan Assoc. v. Royall*, 131.

§ 28. Construction and Operation of Timber Deeds

Plaintiff's action to recover for breach of the covenants in a timber deed was

DEEDS — Continued

governed by the Uniform Commercial Code and the four-year statute of limitations of G.S. 25-2-725(1). *Mills v. New River Wood Corp.*, 576.

DESCENT AND DISTRIBUTION**§ 5. Adopted Children**

Natural children of a deceased spouse who were born during a first marriage but adopted by deceased's second spouse during the second marriage are lineal descendants by the second marriage within the meaning of G.S. 30-3(b) so that the dissenting second spouse is entitled to a greater share of deceased's estate. *In re Estate of Edwards*, 302.

DIVORCE AND ALIMONY**§ 11. Divorce from Bed and Board; Indignities to the Person which Render Life Burdensome**

Evidence that the husband told the wife that she should pay 50% of all living expenses or "get out" and that he wanted her wedding ring back was insufficient to require the court to submit an issue of indignities to the jury. *Hall v. Mabe*, 758.

§ 16.8. Alimony; Findings as to Ability to Pay

The trial court did not err in an action for divorce and alimony by failing to determine the standard of living to which the parties had become accustomed during the marriage. *Beaman v. Beaman*, 717.

The trial court did not err in an action for divorce and alimony by failing to find and consider the value of defendant wife's estate. *Ibid.*

The trial court did not err by failing to find that defendant wife was capable of earning a greater income than she was currently earning. *Ibid.*

The trial court did not err by concluding that plaintiff was the supporting spouse and defendant a dependent spouse. *Ibid.*

The trial court did not err by not making a specific finding concerning the contributions of each party to the financial status of the marriage. *Ibid.*

The trial court erred by failing to find the extent to which defendant wife's business expenses duplicated her personal expenses. *Ibid.*

§ 17.3. Amount of Alimony

The findings made by the trial judge were insufficient to indicate that he considered all of the factors enumerated by G.S. 50-16.5(a) and the Court of Appeals was unable to determine whether the award of alimony was necessary, fair, and within the defendant's ability to pay. *Gebb v. Gebb*, 309.

§ 18.17. Validity and Construction of Alimony Pendente Lite Orders

A temporary alimony and child support order was not void or voidable because the trial judge provided that the cause would be calendared for reconsideration within one hundred eighty days if not previously disposed of by trial and no hearing or final disposition by trial occurred within the one hundred eighty days. *Graham v. Graham*, 422.

§ 21.5. Enforcement of Alimony Awards; Punishment for Contempt

A judgment finding defendant in willful contempt for failure to comply with a temporary alimony and child support order is vacated and the cause remanded for further findings as to defendant's ability to comply with the order. *Graham v. Graham*, 422.

DIVORCE AND ALIMONY — Continued**§ 23. Jurisdiction of Child Custody Proceedings Generally**

The district court properly found that North Carolina is the home state of a child so that it had jurisdiction to determine custody of the child. *Brewington v. Serrato*, 726.

The district court's findings were sufficient to establish that a child and at least one parent had a significant connection with North Carolina so as to give the court jurisdiction to determine custody of the child. *Ibid*.

§ 23.6. Child Custody; Refusal to Take Jurisdiction; Inconvenient Forum

The trial court did not err in refusing to decline to exercise jurisdiction of a proceeding to change child custody on the ground of inconvenient forum. *Kelly v. Kelly*, 632.

§ 24. Child Support Generally

The obligation to support one's children is not a debt in the legal sense of the word and a defendant could be required to pay child support out of his workers' compensation benefits. *S. v. Miller*, 436.

§ 24.1. Determining Amount of Child Support

Evidence of the earnings and estate of the children's stepfather was irrelevant in a proceeding to increase child support. *Barker v. High*, 227.

§ 24.2. Child Support; Effect of Separation Agreements

The trial court erred in concluding that defendant waived the right to receive child support from plaintiff in a separation agreement. *Voss v. Summerfield*, 839.

§ 24.4. Enforcement of Child Support Orders; Contempt

The trial court's findings were insufficient to support an order imprisoning defendant unless he paid \$40 each week on a child support arrearage. *S. v. Miller*, 436.

The trial court's findings of fact did not support a judgment of imprisonment for civil contempt for arrearages in child support where there was no finding relating to defendant's ability to pay the amount required to purge himself of contempt. *McMiller v. McMiller*, 808.

§ 24.6. Child Support; Changed Circumstances; Sufficiency of Evidence Generally

Evidence of the incomes of the parties for 1980 was admissible in determining whether a change of circumstances had occurred since the entry of a child support order in January 1981 which would support an increase in child support. *Barker v. High*, 227.

§ 24.7. Modification of Child Support where Evidence of Changed Circumstances Is Sufficient

Evidence that the children's expenses have increased as they have become older and that plaintiff's earnings have increased supported a conclusion of a substantial change in circumstances justifying an increase in the amount of child support. *Barker v. High*, 227.

§ 24.8. Modification of Child Support where Evidence of Changed Circumstances Is Insufficient

Remarriage of the mother and change of residence to another state did not constitute a substantial change of circumstances to justify modification of a child custody order. *Kelly v. Kelly*, 632.

DIVORCE AND ALIMONY — Continued

The birth of an illegitimate child to the custodial mother did not constitute a sufficient change of circumstances to support an order modifying child custody. *Ibid.*

§ 24.9. Modification of Child Support Order; Findings

The findings of fact were not sufficient to support an order for child support and an order that defendant make certain repairs to a house previously awarded to plaintiff and the minor children. *Gebb v. Gebb*, 309.

§ 25.12. Child Custody; Visitation Privileges

The evidence was sufficient to support the court's limitation of defendant's visits with her child to plaintiff's home with others present, but a provision permitting visitation "at such times as the parties may agree" was improper. *Brewington v. Serrato*, 726.

§ 26.1. Child Custody; Cases Involving Full Faith and Credit Clause

North Carolina was not bound by a Texas child custody order giving the mother custody where the Texas court failed substantially to comply with the jurisdictional requirements of the Uniform Child Custody Jurisdiction Act. *Brewington v. Serrato*, 726.

§ 27. Attorney's Fees Generally

Appellate review of an order regarding attorney's fees was premature where the court found that plaintiff was without funds to pay counsel fees and that defendant was liable for payment but declined to award counsel fees at the time of the order. *Gebb v. Gebb*, 309.

The trial court did not err in awarding defendant wife attorney's fees in an action for divorce and alimony. *Beaman v. Beaman*, 717.

The trial court did not err in refusing to award defendant mother attorney fees and travel expenses in an interstate child custody dispute. *Brewington v. Serrato*, 726.

§ 30. Equitable Distribution

An order of equitable distribution must be supported by a finding of fact that a judgment of absolute divorce has been entered by a court of competent jurisdiction. *McIver v. McIver*, 232.

The trial court had no authority in an action for alimony, custody, and child support to order division of marital property where the pleadings in the case disclosed no request by either party for division of property and the order did not reflect that the payments were in satisfaction of defendant's obligations to pay alimony and child support. *Gebb v. Gebb*, 309.

The trial court should have identified plaintiff's dental license as separate property and considered it as one of the factors affecting equitable distribution. *Dorton v. Dorton*, 667.

The trial court erred in altering a writ of possession of the family home as child support in its equitable distribution judgment. *Ibid.*

The trial court could not properly disregard the corporate entity of a family corporation in favor of plaintiff husband for equitable distribution purposes because of noncompliance with corporate formalities. However, the cause is remanded for a new hearing and consideration of whether to disregard the corporate entity based on other relevant factors properly supported by the evidence. *Ibid.*

DIVORCE AND ALIMONY — Continued

The trial court erred in failing to identify plaintiff's dental practice, including its goodwill, as marital property for equitable distribution purposes. *Ibid.*

The trial court could properly consider that one spouse worked outside the home and participated in child-rearing and homekeeping while the other spouse only participated in child-rearing and homekeeping. *Ibid.*

The trial court had authority to forbid either party to its equitable distribution order from receiving a commission or broker's fee on the sale of the marital home. *Ibid.*

Financial contributions by defendant wife from her separate property which were used for down payments and improvements on various homes purchased by the parties during the marriage were gifts to the marriage, and the portion of the equity in the parties' current home which was derived from defendant's contributions is marital property. *Dewey v. Dewey*, 787.

The trial court's error in failing to value the marital property as of the date of the parties' separation was not prejudicial error where the parties will receive the same amount of property regardless of whether the property is valued at the time of separation or at the times found by the court. *Ibid.*

The trial court's finding of the annual sum that plaintiff will receive from his pension as separate property was sufficient without a calculation of the present value of the pension. *Ibid.*

EASEMENTS**§ 5. Creation of Easements by Implication**

An agreement disclaiming an implied easement by necessity is within the purview of the statute of frauds and is not enforceable unless in writing and properly recorded in the county where the affected land lies. *Mountain View, Inc. v. Bryson*, 837.

EMINENT DOMAIN**§ 3. Necessity of Public Purpose under Power of Eminent Domain**

A city's attempt to condemn a portion of respondents' property for water and sewer lines to be installed solely for the benefit of a manufacturing plant on adjacent property constituted an improper use of the power of eminent domain for a private purpose. *City of Statesville v. Roth*, 803.

§ 6.6. Evidence of Value; Qualification of Witness

Defendants' witnesses were not required to be experts in land appraisal in order to state opinions of the value of the land taken. *City of Burlington v. Staley*, 175.

The fact that two of defendants' witnesses were related to defendants does not go to the admissibility of their value testimony. *Ibid.*

There was sufficient evidence that defendants' value witnesses were reliable in their testimony even though they were unable to recite specific sales prices of comparable tracts on cross-examination. *Ibid.*

§ 6.7. Evidence of Value; Testimony as to Uses of Land

Testimony by defendants' witnesses that the highest and best use of condemned land was for residential or recreational development was not totally speculative. *City of Burlington v. Staley*, 175.

EMINENT DOMAIN – Continued**§ 7.1. Proceedings to Take Land and Assess Compensation Generally**

Any impropriety in references to federal funding for the water project for which land was condemned constituted harmless error. *City of Burlington v. Staley*, 175.

ESTOPPEL**§ 4.3. Equitable Estoppel; Conduct of Party Sought to Be Estopped**

A letter written by defendant's counsel to plaintiff's counsel did not equitably estop defendant from asserting the statute of limitations of G.S. 1-52. *Blizzard Building Supply v. Smith*, 594.

EVIDENCE**§ 22.1. Evidence at Proceeding of Another Case Arising from Same Subject Matter**

There was no reversible error in an action arising from the termination of plaintiff's agreement to manage defendant's apartments where the court admitted testimony about disciplinary action taken by the North Carolina Real Estate Licensing Board concerning the alleged failure of plaintiff's agent to turn security deposits over to defendant. *Reliable Properties, Inc. v. McAllister*, 783.

§ 41. Nonexpert Opinion Evidence; Invasion of Province of Jury

Although it was permissible under G.S. 8C-1, Rule 704 for a surveyor to state his opinion as to the location of a boundary, the trial court did not err in allowing the surveyor to state his opinion only as to the boundaries on the official court map and in excluding testimony locating the boundaries on private maps. *Livermon v. Bridgett*, 533.

§ 50.2. Testimony by Medical Experts as to Cause of Injury

Statements by a child to a pediatrician and a psychologist concerning abusive acts by her father were admissible under G.S. 8C-1, Rule 803(4) as an exception to the hearsay rule. *In re Helms*, 617.

§ 56. Expert Testimony as to Value

A witness was qualified to state his opinion as to the fair market value of plaintiffs' lands had timber thereon been cut according to accepted practices of the timbering and logging business. *Mills v. New River Wood Corp.*, 576.

FIDUCIARIES**§ 1. Generally**

The trial court did not err by entering a judgment for defendant on a breach of fiduciary duty claim arising from defendant's investment of plaintiff's funds. *Childers v. Hayes*, 792.

The trial court did not err in an action arising from defendant's investment of plaintiff's money by dismissing plaintiff's unfair and deceptive trade practices claim and by failing to find that defendant had breached his duty of loyalty and his duty to keep control of the trust property. *Ibid*.

FORGERY**§ 2.2. Sufficiency of Evidence**

Evidence that defendant had forged an endorsement on a check was sufficient without proof that the payee's signature was unauthorized where the only indication that the payee was an actual person was a self-serving statement made by defendant. *S. v. Shipman*, 650.

FRAUD**§ 9. Pleadings**

The trial court did not err by granting defendants' motion for a Rule 12(b)(6) dismissal of plaintiff's cause of action for fraud and deceit where plaintiff teacher alleged that defendants had made a representation that he would be rehired for the upcoming school year but plaintiff was ultimately not rehired. *Braun v. Glade Valley School, Inc.*, 83.

The trial court did not err by dismissing one of plaintiff's causes of action for fraud and deceit where plaintiff teacher alleged that defendants withdrew a highly favorable recommendation after receiving notice that plaintiff was seeking legal assistance regarding defendants' failure to rehire him. *Ibid.*

§ 12. Sufficiency of Evidence

Plaintiffs failed to make out a prima facie case for the fraudulent sale of land in its natural, undeveloped state where they alleged a false representation that the land could be developed for residential purposes but failed to allege that defendants inhibited plaintiffs from inspecting or inquiring about the land. *Williams v. Jenette*, 283.

§ 12.1. Nonsuit

Summary judgment was properly granted for defendant in an action by one joint obligor on a promissory note against the other. *Johnson v. Holbrook*, 485.

The trial court did not err in an action for fraud arising from defendant's investment of plaintiff's money by granting plaintiff's Rule 41(b) motion for dismissal where the representations defendant made regarding future conduct did not relate to material past existing facts and the federal court rulings which allegedly gave defendant notice of the falsity of his representations did not occur until after the representations were made. *Childers v. Hayes*, 792.

GRAND JURY**§ 3.3. Sufficiency of Evidence of Racial Discrimination**

There was no error in a prosecution for breaking and entering and rape in the trial court's denial of defendant's motion to quash the indictment because of discrimination against blacks in the selection of grand jury foremen. *S. v. Cofield*, 699.

GUARDIAN AND WARD**§ 2. Appointment, Qualification, and Tenure**

An order changing the legal guardians of a child was not valid where there was no showing that the guardians had either neglected their duties or were unfit to continue serving. *In re Williamson*, 53.

HIGHWAYS AND CARTWAYS**§ 12. Cartways Generally**

The trial court erred in denying respondent's motion for a directed verdict in a cartway proceeding where petitioner had the burden of proving the inadequacy of alternative outlets and there was no evidence regarding the feasibility of creating direct access from petitioner's land up a steep grade to a public highway. *Campbell v. Connor*, 627.

HOMICIDE**§ 6.1. Involuntary Manslaughter**

Involuntary manslaughter is a lesser-included offense of murder. *S. v. Lane*, 741.

§ 15.5. Expert Opinion as to Cause of Death

A pathologist was properly permitted to state his opinion that the injuries he noted in performing an autopsy on the victim "could have been caused by a foot or boot" and that more force was involved in causing the injuries than simply bumping into things or falling down. *S. v. Davis*, 68.

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

There was sufficient evidence to submit murder to the jury in a case arising out of a struggle between an off-duty police officer and a man with a history of violent paranoid schizophrenia. *S. v. Hamilton*, 506.

§ 21.3. Sufficiency of Evidence that Death Resulted from Wound

The evidence in a murder prosecution was sufficient to go to the jury on whether shots fired during an incident caused the victim's death. *S. v. Hamilton*, 506.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

There was sufficient evidence of malice for second degree murder. *S. v. Allen*, 142.

The State's evidence was insufficient to support defendant's conviction of second degree murder where it raised no more than a suspicion or conjecture that a crime was committed or that defendant was the person who committed it. *S. v. Hood*, 170.

§ 21.8. Sufficiency of Evidence of Second Degree Murder Where Defendant Enters Plea of Self-Defense

There was sufficient evidence in a murder prosecution to go to the jury on the question of whether defendant was the aggressor and did not act in self-defense. *S. v. Hamilton*, 506.

§ 21.9. Sufficiency of Evidence of Manslaughter

There was sufficient evidence of culpable negligence to support defendant's conviction of involuntary manslaughter. *S. v. Lane*, 741.

§ 28.7. Instructions on Defense of Insanity

The evidence did not require an instruction on the defense of temporary insanity where defendant's only evidence of insanity was his testimony to the effect that, upon finding his wife in a motel room with two men, he "lost his mind" and "was all to pieces." *S. v. Davis*, 68.

HOMICIDE — Continued**§ 30.2. Submission of Lesser Offense of Manslaughter**

There was no evidence in this murder case that defendant acted in the heat of passion on sudden provocation so as to require the trial court to instruct on voluntary manslaughter. *S. v. Bare*, 516.

§ 30.3. Submission of Lesser Offense of Involuntary Manslaughter

The trial court did not err in a murder prosecution by refusing to instruct on involuntary manslaughter. *S. v. Hamilton*, 506.

HUSBAND AND WIFE**§ 11.2. Construction of Separation Agreements**

Plaintiff husband has a present obligation to designate his former wife as beneficiary under his military retirement annuity plan pursuant to his agreement to do so in a separation agreement and a consent order, even though at the time the separation agreement and consent order were signed, federal statutes prohibited the designation of a former spouse as beneficiary of military retirement benefits. *Rockwell v. Rockwell*, 381.

§ 12. Revocation and Rescission of Separation Agreements

A separation agreement was not modified when plaintiff orally told defendant that she was making a wedding present to him upon his remarriage of all alimony payments due under their separation agreement. *Greene v. Greene*, 821.

INCEST**§ 1. Generally**

Defendant's failure to object at trial failed to preserve for appellate review the relevancy of questions as to incestuous conduct between defendant's father and sisters. *S. v. Barnes*, 212.

INDICTMENT AND WARRANT**§ 5. Validity of Proceedings before Grand Jury as Affected by Irregularities in Endorsement and Return of Bill of Indictment**

The trial court did not err in a prosecution for robbery with a dangerous weapon by denying defendant's motion to dismiss for lack of jurisdiction where notice of the return of the bill of indictment was mailed to the wrong address. *S. v. Williams*, 136.

§ 10. Identification of Accused in Indictment

Indictments were not invalid because defendant's name was not set forth in the body of the indictments but appeared only in the captions. *S. v. Johnson*, 583.

INFANTS**§ 6.2. Modification of Custody Order**

An order transferring custody of a child was not supported by evidence and findings that circumstances had substantially changed since the original placement. *In re Williamson*, 53.

INFANTS — Continued

§ 15. Temporary Custody and Detention of Delinquent; Bail

A juvenile adjudicated delinquent was not prejudiced by the trial judge's failure to release him pending appeal or to state in writing compelling reasons why he should not be released. *In re Bass*, 110.

§ 16. Delinquency Hearings Generally

There was no prejudice from the trial judge's failure to hold a probable cause hearing before adjudicating respondent delinquent. *In re Bass*, 110.

§ 17. Juvenile Delinquent; Forms of Self-Incrimination

G.S. 7A-596 applied in the prosecution of a juvenile for attempted first degree rape and the evidence of a one-on-one showup conducted without a court order before the juvenile was bound over to superior court should have been excluded. *S. v. Norris*, 525.

The pretrial identification of a juvenile should have been suppressed where the identification was made in a showup without a court order in violation of G.S. 7A-596. *In re Stallings*, 592.

INJUNCTIONS

§ 12. Notice of Temporary Orders

An order issued by a district court judge to the county commissioners was void where the injunctive order was not issued incident to any pending action, no complaint was filed, no summons was issued, and there was no notice or opportunity to be heard. *In the Matter of the Board of Comm. of Dare Co.*, 596.

§ 12.2. Notice of Temporary Orders; Consideration on Merits

The trial court erred by granting a permanent injunction against proceeding under a default judgment at a hearing on whether to extend a temporary restraining order. *Everette v. Taylor*, 442.

§ 13. Grounds for Issuance of Temporary Orders

The trial court had no authority to enter that portion of a preliminary injunction prohibiting landowners from conveying their property in an action concerning annexation and condemnation of the property. *Yandle v. Mecklenburg County; Mecklenburg County v. Town of Matthews*, 660.

INSURANCE

§ 2.2. Liability of Agent to Insured for Failure to Procure Insurance

An award of punitive damages against an insurance company for failure to procure insurance was not supported by the evidence. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 475.

There was no error in an action arising from a failure to procure insurance in admitting evidence that tended to show that defendant's agent had experienced problems or delays with other accounts with defendant. *Ibid.*

There was no error in an action arising from a failure to procure insurance in permitting plaintiff's attorney to read into evidence the first sentence of G.S. 58-46 (1982). *Ibid.*

§ 2.4. Liability of Agent to Insurer for Failure to Procure Insurance

There was no prejudicial error in an action against an insurance company and agent arising from a failure to procure insurance by granting the agent's motion for

INSURANCE — Continued

a directed verdict on the company's crossclaim for indemnity. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 475.

§ 69. Automobile Insurance; Protection against Injury by Uninsured Motorist Generally

A provision in plaintiff's automobile insurance policy prevented the stacking or aggregating of uninsured motorist coverages on three separate automobiles covered by plaintiff's policy. *Hamilton v. Travelers Indemnity Co.*, 318.

§ 69.2. Automobile Insurance; Meaning of "Uninsured Vehicle"

An underinsured motorist's automobile was an "uninsured automobile" within the meaning of plaintiff's automobile policy. *Hamilton v. Travelers Indemnity Co.*, 318.

§ 70. Contracts to Procure Automobile Collision Insurance

The purchaser of an automobile had an insurable interest and there was a valid contract of insurance in an action by a car dealer against the purchaser of a car to whom title had not yet been transferred when it was wrecked. *Roseboro Ford, Inc. v. Bass*, 363.

§ 74. Actions on Automobile Collision Policies

An automobile dealer was not entitled to summary judgment against defendant insurance company in an action by the dealer against the company providing collision insurance and the purchaser of a car to which title had not been transferred when it was wrecked. *Roseboro Ford, Inc. v. Bass*, 363.

§ 149. General Liability Insurance

A subcontractor who sandblasted military barracks buildings had "care, custody or control" of barracks windows within the meaning of a general liability insurance policy provision excluding coverage for damage to "property in the care, custody or control of the insured." *South Carolina Ins. Co. v. Southeastern Painting Co.*, 391.

INTEREST

§ 2. Time and Computation

The trial court did not err in awarding prejudgment interest for breach of a covenant in a timber deed. *Mills v. New River Wood Corp.*, 576.

JUDGMENTS

§ 14. Nature and Extent of Clerk's Authority to Enter Default

The clerk had no authority to enter a default judgment where defendants had made an appearance by filing a motion for an extension of time to plead. *Williams v. Jennette*, 283.

KIDNAPPING

§ 1. Definitions; Elements of Offense

The indictment was insufficient to charge first degree kidnapping where it only alleged the elements of kidnapping set forth in G.S. 14-39(a) but failed to allege an element set forth in G.S. 14-39(b) that defendant did not release the victim in a safe place, seriously injured the victim, or sexually assaulted the victim. *S. v. Jackson*, 491.

KIDNAPPING — Continued**§ 1.2. Sufficiency of Evidence**

There was sufficient evidence of a separate confinement and restraint to satisfy G.S. 14-39 where defendant forced the victims at gunpoint to walk from the front of a store to a dressing room in the rear of the store and it was not necessary to move the victims there in order to commit the robbery. *S. v. Davidson*, 540.

There was sufficient evidence to support defendant's conviction for second degree kidnapping where the evidence would allow the jury to find that a store owner was restrained to facilitate the taking of his wallet contents and to facilitate flight. *S. v. Mitchell*, 663.

The evidence was sufficient to support a verdict that defendant was guilty of second degree kidnapping. *S. v. Moore*, 553.

The evidence was sufficient to permit the jury to infer an intent to rob so as to support the charge against defendant of kidnapping for the purpose of facilitating the commission of armed robbery. *S. v. Torbit*, 816.

§ 1.3. Instructions

Defendant was entitled to a new trial for kidnapping under the plain error rule where the indictment alleged that a store owner was restrained to facilitate a felony or flight and the court instructed the jury on terrorizing. *S. v. Mitchell*, 663.

LANDLORD AND TENANT**§ 13.3. Notice of Renewal**

Defendant lessee validly exercised its option to renew the lease by mailing notice to two of the eight co-tenant owners. *Terry v. Brothers Investment Co.*, 1.

LARCENY**§ 4.2. Indictment; Ownership or Possession of Property**

A larceny indictment was fatally defective where it failed to allege the ownership, possession or right to possession of the property stolen. *S. v. Johnson*, 583.

§ 6.1. Competency of Evidence of Value of Property Stolen

Incompetent testimony by the owner of a stolen truck as to the price for which he would sell the vehicle could properly be considered on a motion for nonsuit where defendant failed to object thereto. *S. v. Waller*, 184.

§ 7.3. Sufficiency of Evidence as to Ownership of Stolen Property

There was a fatal variance where a larceny indictment alleged that stolen letter openers were the property of a Catholic church but the evidence showed that they belonged to a priest. *S. v. Johnson*, 583.

§ 7.4. Sufficiency of Evidence of Possession of Stolen Property

The trial court properly instructed the jury on the doctrine of possession of recently stolen property although the victim was unable to identify money found in defendant's possession as money stolen from her home. *S. v. Fair*, 641.

§ 7.5. Sufficiency of Evidence of Aiding and Abetting

The State presented insufficient evidence to support defendant's conviction of felonious larceny as an aider and abettor by driving the car in which the perpetrator was riding. *S. v. Capps*, 400.

LARCENY — Continued**§ 7.7. Sufficiency of Evidence of Larceny of Automobile**

The trial court did not err by denying a juvenile's motion to dismiss the charge of felonious larceny. *In re Bass*, 110.

§ 8.4. Instructions as to Presumption from Possession of Recently Stolen Property

Defendant was not prejudiced by the court's refusal to give his requested instruction on the doctrine of recent possession that he must have had possession of the property under such circumstances as to make it unlikely that he obtained possession "by any other way than by committing the offenses of breaking or entering and larceny with which he is charged" rather than under such circumstances "as to make it unlikely that he obtained possession honestly." *S. v. Locklear*, 414.

LIMITATION OF ACTIONS**§ 4.2. Accrual of Negligence Actions**

Plaintiffs have a cause of action for negligence against the builder of a house even though they were not the original purchasers, but their claim was barred by the six-year statute of repose of G.S. 1-50(5). *Evans v. Mitchell*, 598.

MASTER AND SERVANT**§ 1. Nature and Requisites of the Relationship in General**

Although language in an employee handbook stated that it would "become more than a handbook . . . it will become an understanding," the handbook did not become a part of plaintiff's employment contract and thus did not restrict the employer's right to terminate plaintiff's employment. *Walker v. Westinghouse Electric Corp.*, 253.

§ 10.2. Actions for Wrongful Discharge

Assuming that a cause of action exists for wrongful discharge in retaliation for raising safety concerns, plaintiff's forecast of evidence was insufficient to survive defendant employer's motion for summary judgment. *Walker v. Westinghouse Electric Corp.*, 253.

§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident

Plaintiff did not suffer a compensable injury by accident within the meaning of former G.S. 97-2(6) where pain in plaintiff's back had been building up over a period of months and pain she felt on the date in question was the same type of pain but worse than before. *Bowles v. CTS of Asheville*, 547.

§ 65.2. Workers' Compensation; Back Injuries

There was no evidence to support the Industrial Commission's finding that plaintiff was engaged in routine duties in his customary fashion and that his back injury was not caused by an accident. *Sanderson v. Northeast Construction Co.*, 117.

The Industrial Commission did not err by awarding compensation to a plaintiff who injured her back when she squatted to pick up a box on the floor but had not touched the box when she felt the back pain. *Bradley v. E. B. Sportswear, Inc.*, 450.

Plaintiff's back injury arose out of her employment where her job required her to carry bundles of cut cloth to sewers and finished products to inspectors and she felt pain in her lower back when she squatted to pick up a box on the floor. *Ibid.*

MASTER AND SERVANT — Continued**§ 68. Workers' Compensation; Occupational Diseases**

The Industrial Commission did not err by awarding compensation under G.S. 97-31(24) (1979) for chronic obstructive lung disease even though it found that plaintiff was not disabled. *Grant v. Burlington Industries, Inc.*, 241.

Plaintiff's evidence was insufficient to support a claim for compensation for occupational obstructive pulmonary disease after plaintiff's retirement in 1974. *Turnage v. Dacotah Cotton Mills*, 769.

§ 68.1. Workers' Compensation; Asbestosis

The evidence in a workers' compensation claim for asbestosis was sufficient to support a finding or conclusion that plaintiff was injuriously exposed to asbestos for thirty working days or parts thereof. *Woodell v. Starr Davis Co.*, 352.

The Industrial Commission's findings in a workers' compensation action for asbestosis adequately supported its determination that plaintiff was last injuriously exposed to the hazards of asbestos for the statutory period while in defendant's employ. *Ibid.*

The evidence was not sufficient in a workers' compensation claim for asbestosis to show that plaintiff was exposed to the inhalation of asbestos dust in his employment for a period of at least two years within North Carolina. *Ibid.*

§ 69. Workers' Compensation; Amount of Recovery Generally

In a workers' compensation action in which a worker who lost both legs and an arm sought reimbursement for a specially equipped van so that he could be independent, the Industrial Commission erred by awarding plaintiff the cost of the van but not by awarding plaintiff the cost of the special adaptive equipment. *McDonald v. Brunswick Elec. Membership Corp.*, 753.

§ 79.1. Workers' Compensation; Persons Entitled to Payment; Dependents

An award of an equal share of workers' compensation benefits to a stepchild was remanded where the Industrial Commission found only that the stepchild was dependent upon the deceased for support at the time of death. *Capps v. Standard Trucking Co.*, 448.

A court was not forbidden by G.S. 97-21 from requiring defendant to pay child support out of his workers' compensation benefits. *S. v. Miller*, 436.

§ 90. Workers' Compensation; Notice to Employer of Accident

The Industrial Commission did not err by not finding that plaintiff had failed to give timely written notice of his back injury. *Sanderson v. Northeast Construction Co.*, 117.

§ 91. Workers' Compensation; Filing of Claim Generally

Defendant employer was equitably estopped from asserting the two-year time limitation of G.S. 97-24 as a bar to plaintiff sawmill worker's claim for compensation for an eye injury. *Belfield v. Weyerhaeuser Co.*, 332.

§ 93. Workers' Compensation; Proceedings before the Industrial Commission Generally

In a workers' compensation case in which defendant filed a motion for a new hearing on the ground that he had not received notice of the hearing which resulted in his being ordered to pay workers' compensation to plaintiff, the Industrial Commission should have treated defendant's motion for a new hearing as one made pursuant to G.S. 1A-1, Rule 60(b). *Long v. Reeves*, 830.

MASTER AND SERVANT — Continued**§ 93.3. Workers' Compensation; Expert Evidence in Proceedings before the Commission**

The Industrial Commission erred in an occupational lung disease case by excluding the testimony of plaintiff's family doctor. *Grant v. Burlington Industries, Inc.*, 241.

§ 94.1. Workers' Compensation; Insufficiency of Findings by Commission

The Industrial Commission's findings were insufficient in an action in which plaintiff sought benefits for total disability from chronic obstructive lung disease. *Grant v. Burlington Industries, Inc.*, 241.

MUNICIPAL CORPORATIONS**§ 4.6. Power of Eminent Domain**

A city's attempt to condemn a portion of respondents' property for water and sewer lines to be installed solely for the benefit of a manufacturing plant on adjacent property constituted an improper use of the power of eminent domain for a private purpose. *City of Statesville v. Roth*, 803.

§ 30.9. Spot Zoning

Genuine issues of material fact were presented as to whether Union County has a comprehensive plan for zoning and whether the rezoning of defendants' property from R-10 to R-8 constituted unlawful contract zoning. *Willis v. Union County*, 407.

NARCOTICS**§ 3.1. Competency of Evidence Generally**

The trial court did not err in a prosecution for possessing, manufacturing and trafficking in marijuana and methaqualone by allowing the State to pile 240 pounds of marijuana on the courtroom floor. *S. v. Watts*, 124.

§ 4.2. Sufficiency of Evidence of Entrapment

There was insufficient evidence to require submission of entrapment to the jury. *S. v. Martin*, 61.

§ 4.4. Insufficiency of Evidence of Constructive Possession

A charge of manufacturing marijuana should have been dismissed for insufficient evidence that defendant had constructive possession of marijuana drying in a barn and growing in patches. *S. v. Beaver*, 734.

NEGLIGENCE**§ 2. Negligence Arising from the Performance of a Contract**

Plaintiffs have a cause of action for negligence against the builder of a house even though they were not the original purchasers, but their claim was barred by the six-year statute of repose of G.S. 1-50(5). *Evans v. Mitchell*, 598.

§ 30.1. Particular Cases where Nonsuit Is Proper

Plaintiff's evidence was insufficient for the jury to find that defendant's negligence caused the crash of a helicopter leased by plaintiff to defendant for defendant's use in learning to fly. *U. S. Helicopters, Inc. v. Black*, 827.

NEGLIGENCE — Continued**§ 34.1. Particular Cases where Evidence of Contributory Negligence Is Sufficient**

The trial court correctly submitted contributory negligence to the jury and denied plaintiff's motion to set aside the verdict on that issue in an action arising from a fall by a police officer on the rear steps of defendants' store. *James v. Honeycutt*, 824.

§ 38. Instructions on Contributory Negligence

The trial court did not err in its instructions on contributory negligence in an action arising from a fall by a police officer on the steps of defendants' store. *James v. Honeycutt*, 824.

§ 47.1. Negligence in Condition of Buildings; Steps

The trial court erred in granting summary judgment for defendant in an action arising from a customer's fall down steps at a hardware store which was allegedly due to defendant's negligent failure to provide a handrail. *Barnes v. Wilson Hardware Co.*, 773.

NUISANCE**§ 1. Generally**

The trial court erred in an action to enjoin a hog farming operation as a nuisance by denying injunctive relief without balancing the utility of the defendants' conduct against the gravity of harm to plaintiffs. *Mayes v. Tabor*, 197.

PARENT AND CHILD**§ 1. Termination of Relationship**

The trial court did not err by entering an order discontinuing visitation allowed pending appeal of an order terminating parental rights where the Supreme Court had affirmed the termination, the best interests of the children required that steps be taken leading to adoption, and the trial court properly concluded that visitation would not be in the best interests of the children. *In re Montgomery*, 709.

§ 1.5. Procedure for Termination of Parental Rights; Right to Counsel

The district court did not have jurisdiction to determine a petition to terminate parental rights where the child had moved to Ohio with its mother four days before the petition was filed. *In re Leonard*, 439.

The trial court properly denied respondent's motion to set aside an order terminating his parental rights entered three years earlier while he was in prison on the ground that his statutory and constitutional rights to appointed counsel in the proceeding were not honored. *In re Saunders*, 462.

The trial court did not abuse its discretion in an action to terminate parental rights by refusing to hear respondents' evidence on their motion to modify the termination for changed circumstances and by denying their motion to modify after the Supreme Court had upheld the termination. *In re Montgomery*, 709.

§ 1.6. Procedure for Termination of Parental Rights; Competency and Sufficiency of Evidence

The trial court did not err at a hearing at which the Department of Social Services sought to terminate visitation between respondents and their children, which had been allowed pending appeal of judgments terminating parental rights, by admitting into evidence psychological evaluations of respondents and their

PARENT AND CHILD — Continued

minor children even though the psychologists who prepared the reports were not subject to cross-examination. *In re Montgomery*, 709.

The trial court's findings and an order ending visitation which had been allowed during appeal of an order terminating parental rights were supported by psychological evaluation reports, stipulations, and previous orders in the case. *Ibid.*

§ 2.2. Child Abuse

There was no prejudice in an action for felonious child abuse in the admission of testimony that a social worker had previously had occasion to be in defendant's household. *S. v. Watkins*, 325.

The evidence supported findings by the trial court concerning respondent's sexual and physical abuse of his five-year-old daughter. *In re Helms*, 617.

§ 5.2. Right of Parent to Recover for Injuries to Child Resulting in Death

Defendant did not establish substantial compliance as a matter of law with a judgment requiring support of his child and summary judgment was improperly entered for him in an action to bar him from proceeds of the child's estate. *Lessard v. Lessard*, 97.

§ 6.4. Right of Visitation

Testimony concerning respondent's sexual and physical abuse of his five-year-old daughter was sufficient to support the court's conclusion that respondent was not a fit and proper person to have visitation privileges with his daughter. *In re Helms*, 617.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS**§ 16. Malpractice; Applicability of Res Ipsa Loquitur**

Plaintiff's forecast of evidence was sufficient to invoke the doctrine of res ipsa loquitur in a medical malpractice action against a hospital system and a surgeon to recover for a burn suffered by the minor plaintiff on her hand during surgery to have her adenoids removed and drainage tubes placed in her ears. *Schaffner v. Cumberland County Hosp. System*, 689.

The inability of a plaintiff who was anesthetized during surgery to identify the instrumentality with which her injury was inflicted and a single defendant in exclusive control thereof did not preclude application of res ipsa loquitur. *Ibid.*

PLEADINGS**§ 9.1. Extension of Time to File Answer**

Once the original time for filing answer had elapsed, only the judge and not the clerk had authority to grant an extension of time for filing answer, and the clerk erred in entering default judgment against defendants while their motion for an extension of time to file answer was pending. *Williams v. Jennette*, 283.

The trial judge did not err in granting defendants' motion for additional time to file answer after the original time had expired. *Ibid.*

PROCESS**§ 14.3. Service of Process on Foreign Corporation; Sufficiency of Evidence of Minimum Contacts**

There were statutory grounds for the exercise of jurisdiction over a Delaware corporation which installed a diesel engine in plaintiff's truck in New Jersey. *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 637.

PROFESSIONS AND OCCUPATIONS

§ 1. Generally

A person certified by the Department of Public Instruction in speech and language pathology is not exempt from the licensing requirements for audiologists. *N. C. Bd. of Examiners for Speech v. State Bd. of Education*, 159.

PUBLIC OFFICERS

§ 9. Personal Liability of Public Officers to Private Individuals

The evidence was insufficient to support a conclusion that defendant notary conspired to defraud plaintiff when defendant notarized a signature placed on a release form for plaintiff by plaintiff's son. *McGee v. Eubanks*, 369.

§ 12. Removal from Office

A State employee has been reduced in position within the meaning of G.S. 126-35 only when the employee is placed in a lower pay grade and not when the employee has been given fewer responsibilities. *Gibbs v. Dept. of Human Resources*, 606.

The chief hearing officer of the State Personnel Commission could properly render a decision based on the record when the hearing officer who heard the testimony resigned before rendering a decision. *Ibid.*

QUASI CONTRACTS AND RESTITUTION

§ 1.2. Unjust Enrichment

A verdict of \$7,400 in favor of plaintiff against his former wife and in-laws for labor and materials provided by plaintiff in the construction of a house owned by the in-laws and intended for use by the wife was improper as to the wife. *Hall v. Mabe*, 758.

§ 2.1. Sufficiency of Evidence in Actions to Recover on Implied Contracts

An issue of unjust enrichment was properly submitted to the jury in an action to recover for labor and materials provided by plaintiff in the construction of a house owned by his in-laws and intended for use by his wife. *Hall v. Mabe*, 758.

QUIETING TITLE

§ 2.2. Evidence

The trial court erred by granting summary judgment for defendants in an action to quiet title to real property in which plaintiff claimed a fee simple absolute interest where the property in question had been conveyed to Stacy Pardue and there was an unresolved material issue of fact as to whether plaintiff's husband, James Stacy Pardue, or her son, Gene Stacy Pardue, was the grantee. *Pardue v. The Northwestern Bank*, 834.

RAPE AND ALLIED OFFENSES

§ 4. Competency of Evidence

Testimony by a pediatrician concerning symptoms of rape trauma syndrome related to him by an alleged rape victim was not admissible under G.S. 8C-1, Rule 803 but was inadmissible hearsay where his examination of the victim was conducted only in preparation for trial. *S. v. Stafford*, 19.

RAPE AND ALLIED OFFENSES — Continued**§ 4.3. Evidence of Character of Prosecutrix**

Testimony by a clinical psychologist that nothing in the thirteen-year-old victim's record or current behavior indicated a mental condition which would cause her to fabricate her story of sexual assault was not testimony relating to character prohibited by Rule of Evidence 405(a) but was proper opinion testimony on mental condition. *S. v. Heath*, 264.

§ 5. Sufficiency of Evidence

The State's evidence was sufficient to support defendant's conviction of attempted first degree rape. *S. v. Parks*, 778.

§ 19. Taking Indecent Liberties with Child

There was a fatal variance between indictment and proof where defendant was charged with performing oral sex with a child in his custody and the State's evidence showed only that defendant placed his finger in the child's vagina. *S. v. Loudner*, 453.

Defendant's motion to dismiss a charge of taking indecent liberties with a minor was properly dismissed. *S. v. Strickland*, 454.

RECEIVING STOLEN GOODS**§ 5.2. Insufficiency of Evidence**

Defendant's motion to dismiss a charge of felonious possession of stolen property should have been granted. *S. v. Bartlett*, 747.

REFERENCE**§ 3.1. Cases and Issues Referrable**

The trial court did not err in ordering a compulsory reference where the pleadings showed a potentially complicated boundary dispute. *Livermon v. Bridgett*, 533.

REFORMATION OF INSTRUMENTS**§ 1.1. Mutual or Unilateral Mistake**

Summary judgment for defendants was proper in an action to reform a deed where plaintiffs alleged that the feme defendant's name was put in the deed through their mistake and that of the scrivener. *Mock v. Mock*, 230.

REGISTRATION**§ 1. Necessity for Registration and Instruments within Purview of Registration Statutes**

An agreement disclaiming an implied easement by necessity is within the purview of the statute of frauds and is not enforceable unless in writing and properly recorded in the county where the affected land lies. *Mountain View, Inc. v. Bryson*, 837.

§ 3. Registration as Notice

The purchaser of property was bound by a prior unrecorded lease, although the purchaser's deed did not mention the prior lease, where a deed in the purchaser's chain of title provided that the conveyed property "is subject to the rights

REGISTRATION — Continued

of tenants in possession pursuant to the terms of a Lease between Carrie Marshall Gallaway and Brothers Investment Company dated March 21, 1963." *Terry v. Brothers Investment Co.*, 1.

ROBBERY**§ 4.3. Sufficiency of Evidence of Armed Robbery**

The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon. *S. v. Bartow*, 103.

The State's evidence was sufficient for the jury to find defendant guilty of armed robbery under the doctrines of possession of recently stolen property and acting in concert. *S. v. Woods*, 622.

The evidence was sufficient to support defendant's conviction of attempted armed robbery. *S. v. Torbit*, 816.

§ 4.7. Insufficiency of Evidence

Defendant's motion to dismiss a charge of armed robbery should have been granted. *S. v. Stallings*, 189.

The evidence was insufficient to support a conviction for robbery with a firearm where the victims, at most, were induced by threats to relent in their attempts to convince defendant to give back what he had already taken. *S. v. Hope*, 338.

§ 5.4. Instructions on Lesser Included Offenses

The evidence in an armed robbery prosecution did not require an instruction on misdemeanor larceny. *S. v. McCullers*, 433.

§ 6.1. Sentence

Solicitation to commit common law robbery is not an "infamous" misdemeanor punishable as a Class H felony under G.S. 14-3(b). *S. v. Mann*, 654.

Although defendant's plea bargain in a common law robbery case provided that the sentence would run concurrently with the sentence imposed in defendant's first trial for armed robbery, the judge at defendant's retrial for armed robbery was required by statute to order defendant's sentence for armed robbery to begin at the expiration of the sentence being served by defendant for common law robbery. *S. v. Woods*, 622.

RULES OF CIVIL PROCEDURE**§ 6. Time**

The clerk had statutory authority to extend the time for plaintiff to file the complaint for a period in addition to the original twenty-day extension. *Williams v. Jennette*, 283.

Once the original time for filing answer had elapsed, only the judge and not the clerk had authority to grant an extension of time for filing answer, and the clerk erred in entering default judgment against defendants while their motion for an extension of time to file answer was pending. *Ibid.*

§ 13. Crossclaim

The trial court properly denied summary judgment in favor of a defendant on a codefendant's crossclaim for contribution where the allegations made it clear that the crossclaim was for indemnity. *Roseboro Ford, Inc. v. Bass*, 363.

RULES OF CIVIL PROCEDURE — Continued**§ 15.1. Discretion of Court to Grant Amendment**

The trial judge had broad discretion to permit or deny an amendment to an answer which would allege a counterclaim, whether the counterclaim to be alleged was compulsory or permissive, and defendant showed no abuse of that discretion in the denial of her motion. *Grant & Hastings, P.A. v. Arlin*, 813.

§ 37. Failure to Make Discovery; Consequences

The trial court did not abuse its discretion in striking defendant's answer and entering default judgment against defendant because of defendant's refusal to comply with a court order to reveal the identity of a material witness or in awarding attorney fees to plaintiffs in addition to the other sanctions imposed. *Vick v. Davis*, 359.

§ 49. Verdicts

Plaintiff waived any right he may have had to have the jury pass on any issues other than the issues submitted where plaintiff expressly approved the issues submitted, advised the court that no other issues were necessary, and neither requested other issues nor took exception to the court's failure to submit other issues. *Dobruck v. Lineback*, 233.

§ 50.3. Grounds for Directed Verdict

The Court of Appeals elected to waive the requirement that a motion for directed verdict state specific grounds and considered the evidence in a cartway proceeding. *Campbell v. Connor*, 627.

§ 50.5. Directed Verdict; Appeal

The Court of Appeals could not direct entry of judgment and a new trial was necessary where the trial court erred by denying respondents' motion for a directed verdict in a cartway proceeding but respondents failed to move for judgment n.o.v. *Campbell v. Connor*, 627.

Defendant adequately preserved for appeal the trial court's denial of its motion for a directed verdict on the issue of punitive damages. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 475.

§ 52. Findings by Court Generally

The court is required to make findings of fact in ruling on a motion only when requested by a party. *Smith v. Mariner*, 589.

§ 53. Referees

The trial court did not err in ordering a compulsory reference where the pleadings showed a potentially complicated boundary dispute. *Livermon v. Bridgett*, 533.

§ 55. Default

Plaintiffs' allegation that they paid defendants \$5,350 to perform a contractual obligation which defendants refused to perform constituted a claim for a "sum certain" for which the clerk could enter default judgment. *Smith v. Barfield*, 217.

The clerk had no authority to enter a default judgment where defendants had made an appearance by filing a motion for an extension of time to plead. *Williams v. Jennette*, 283.

SCHOOLS

§ 13. Teachers

The trial court did not err in an action arising from the failure of a private boarding school to rehire plaintiff as a teacher because plaintiff did not have a multiple certification by excluding evidence that other teachers were employed without multiple certifications. *Braun v. Glade Valley School, Inc.*, 83.

The trial court did not err by granting defendants' motion for a directed verdict in an action arising from the failure of defendant private school to rehire plaintiff as a teacher where plaintiff had received a letter from the headmaster stating that he planned for defendant to be part of the faculty. *Ibid.*

SEARCHES AND SEIZURES

§ 13. Search and Seizure by Consent

The trial court did not err in a prosecution for trafficking in cocaine by denying defendant's motion to suppress evidence seized from his person and statements made by him during and after an airport investigative stop pursuant to the drug courier profile. *S. v. Perkerol*, 292.

§ 14. Voluntary, Free, and Intelligent Consent to Search

Defendant waived any right to object to a stop and freely and voluntarily consented to a search which yielded heroin and cocaine in an airport. *S. v. White*, 45.

§ 16. Consent to Search Given by Members of Household

Officers lawfully seized marijuana and opium poppy plants from a building behind defendant's house where defendant's probation officer and several deputies lawfully searched the fields behind defendant's house under the "open fields" doctrine, officers observed the plants through an open door and could have seized them under the "plain view" doctrine, and officers obtained the consent of defendant's wife to search the premises before they returned to the building and seized the plants. *S. v. Grindstaff*, 467.

SHERIFFS AND CONSTABLES

§ 4. Civil Liabilities to Individuals

Summary judgment should not have been granted for defendant sheriff in a wrongful death action arising from the suicide of plaintiff's husband in the sheriff's jail but summary judgment was correctly granted for the county and the county commissioners. *Helmly v. Bebbler*, 275.

TENANTS IN COMMON

§ 5. Conveyance, Sale, or Encumbrancing of Property

Defendant lessee validly exercised its option to renew the lease by mailing notice to two of the eight co-tenant owners. *Terry v. Brothers Investment Co.*, 1.

TRESPASS TO TRY TITLE

§ 4.1. Sufficiency of Evidence; Fitting Descriptions in Chain of Title to Land Claimed

Defendant's evidence was sufficient to locate property on the grounds so as to permit defendant's claim of title to be submitted to the jury. *Burris v. Shumate*, 209.

TRIAL

§ 4. Nonsuit for Failure to Appear or Prosecute Action

The trial court erred by dismissing plaintiff's action for failure to appear and prosecute where plaintiff had not been ordered to appear for trial and plaintiff's attorney was present and appeared ready to go forward with his case. *Terry v. Bob Dunn Ford, Inc.*, 457.

§ 42.2. Sufficiency of Verdict; Quotient Verdicts

The trial court properly denied plaintiff's motion for a new trial in a condemnation action on the ground that the jury reached an improper compromise verdict when it awarded an amount of damages which was between the amount shown by plaintiff's evidence and the amount shown by defendants' evidence. *City of Burlington v. Staley*, 175.

TRUSTS

§ 9. Revocation of Trusts

Judgment was correctly granted for defendant executor and attorney in fact in an action by a beneficiary to recover funds deposited in a tentative trust where the funds were withdrawn from the bank account by the attorney in fact before the death of the depositor. *Baker v. Cox*, 445.

UNIFORM COMMERCIAL CODE

§ 3. Application

Plaintiff's action to recover for breach of the covenants in a timber deed was governed by the Uniform Commercial Code and the four-year statute of limitations of G.S. 25-2-725(1). *Mills v. New River Wood Corp.*, 576.

VENDOR AND PURCHASER

§ 1.4. Exercise of Option

Summary judgment was properly entered for plaintiffs in an action to enforce an option to buy land where there was no abandonment or breach of the option. *Lancaster v. Lumby Corp.*, 644.

§ 6. Responsibility for Condition of Premises; Failure to Disclose Material Facts

Plaintiffs failed to make out a prima facie case for the fraudulent sale of land in its natural, undeveloped state where they alleged a false representation that the land could be developed for residential purposes but failed to allege that defendants inhibited plaintiffs from inspecting or inquiring about the land. *Williams v. Jenette*, 283.

§ 8. Purchaser's Right to Damages for Vendor's Breach

The trial court erred by granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment in an action for the return of purchase money paid under a contract for the purchase and sale of real estate. *Johnson v. Smith, Scott & Assoc., Inc.*, 386.

VENUE

§ 5. Actions to Recover Personal Property

Where the lessor of farm equipment sought to recover rentals due under the lease agreement and to recover the equipment in order to sell it and apply the proceeds against the sum due, the trial court was not required by statute to transfer the case to the county in which defendant lessee resides or to the county where the leased equipment is located. *M & J Leasing Corp. v. Habegger*, 235.

VENUE — Continued

Stock certificates are not the kind of personal property which would require a change of venue under G.S. 1-76(4) and G.S. 1-83(1) to the county where the certificates are located. *Smith v. Mariner*, 589.

§ 5.1. Actions Involving Real Property

Where plaintiff sought a declaratory judgment as to whether it is obligated under a quarry lease to make rental payments for rock quarried from land adjacent to the leased premises, defendants were not entitled to a change of venue as a matter of right under G.S. 1-76 from the county of plaintiff's residence to the county in which the leased property is located. *McCrary Stone Service v. Lyalls*, 796.

§ 8. Removal for Convenience of Parties and Witnesses

Defendant failed to show that the convenience of the witnesses and the ends of justice required the trial court to change venue to the county where all the attorneys and all the witnesses except plaintiff resided. *Smith v. Mariner*, 589.

§ 9. Hearing of Motions and Subsequent Proceedings

Appeal from the denial of a motion for a change of venue as a matter of right was not premature. *Smith v. Mariner*, 589.

The form of action stated in the complaint controls venue, and the court cannot consider defendants' allegations in their counterclaim in determining venue. *McCrary Stone Service v. Lyalls*, 796.

WILLS

§ 40.4. Devises with Power of Disposition; Exercise of Power by Will

The trial court did not err by holding that a general residuary clause in a will failed to exercise a power of appointment established in a trust because it did not refer to the power of appointment. *In the Matter of: First Citizens Bank & Trust Co. v. Fleming*, 568.

§ 61. Dissent of Spouse

Natural children of a deceased spouse who were born during a first marriage but adopted by deceased's second spouse during the second marriage are lineal descendants by the second marriage within the meaning of G.S. 30-3(b) so that the dissenting second spouse is entitled to a greater share of deceased's estate. *In re Estate of Edwards*, 302.

There was no error in allowing a dissent under a will where the alleged agreement between the dissenting widow and the estate was not a family settlement agreement because it was signed by only two of the four beneficiaries under the will. *In re Estate of Outen*, 818.

WITNESSES

§ 6. Evidence Competent to Impeach or Discredit Witness

Evidence of pending civil litigation filed by one prosecuting witness against the defendant in a criminal case was admissible to show bias or interest of the prosecuting witnesses. *S. v. Dixon*, 27.

§ 7. Refreshing Memory

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Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina